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Ch. Head THE Book
L A W 1795

O F

Executions :

O R, A

Treatise Shewing and Explaining the Nature of Executions in several Rules, and who may Sue Execution or not, and against what Persons. By and out of what Court Execution to be Awarded. The several Sorts of Execution, and when to be Sued out. To what time Execution shall relate, as to Lands, as to Goods. Executions joint or several. *Capias ad Satisfac'*. *Fieri facias*, how the Property of the Goods is altered by the Sheriffs Seizure, or not. Stat. 29 Car. 2. c. 3. explained. *Habere fac' possessionem*. What Execution after *Ca' Sa'*, *Elegit*, &c. *Scire facias*, the Nature and Reason of it, and Process. *Elegit*. *Levari facias*. Extent, the Nature of it. Of Re-extent. Stat. 32 H. 8. c. 5. explained. What Things are extendible, and in hands of whom. Where the Conusee, &c. shall hold the Land over. Execution in reference to the King's Prerogative. *Liberate*. Statute Merchant, Staple, and on 23 H. 6. the Diversity of their Natures. Recognisances. *Scire facias* on Recognisance against the Bail, and Pleadings. Declarations and Pleadings on Statutes and Recognisances. Pleas after Judgment. Of Discharging of Executions by several ways. Of Restitution.

All Illustrated and Explained, in Subdivisions, by our Book Cases, Reports, and Presidents.

0 By S. C. Esq; Author of *Lex Custumaria*.

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London: Printed by the Assigns of Richard and Edward Atkins Esqs; for Robert Battersby, at Staple-Inn-Gate, next the Bars in Holbourn. 1796.

Samuel Carter

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Wm Greer. 1077.

T H E
P R E F A C E.

IT is commonly said (and with truth enough) that Execution is the Life of the Law; for all the *Originals, Counts, Pleadings, Issues, Trials and Judgments*, till they conclude in this, are but tedious and chargeable Preliminaries, and without Execution are but *Difficiles nugæ*. But when a Man comes to recover his Debt or Duty, Costs and Damages, he may then sing a *Requiem*, and applaud himself with a *finis coronat opus*. Therefore it appears to be matter of weighty Consideration and great Dexterity, that the end be answerable to the Means, and that after all it may not be *Superseded, Reversed or Defeated*, but that the Execution may be grounded upon a good *Basis*. How many fatal Miscarriages do we meet with when they are not exactly applied to the Judgment, but vary from it? when they are not

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awarded out of the Right and proper Courts, or not directed to right or proper Persons or Places? Sometimes the Actions are joint where they ought to be several, and *è contra*. Sometimes and in some Cases, one Execution may be taken out after another, and sometimes not, and a mistake thereof may finally Bar. Some things are extendible or not, and upon some Sorts of Executions and not upon others; and there are great diversities between Extent upon a Judgment and upon a Statute and also upon a Statute Merchant and a Staple; and very often the Queen's Prerogative (if the Subject be not wary) will sweep away all. As for the Learning of Statutes and Recognizances its very nice, depending wholly upon Statute Law. It is of great use in Matters of this Nature to understand how and by what means a Man may be discharged out of Execution, either as to Body or Lands; and one must have a care what Releases or Surrenders he gives or accepts, and what Purchases he makes, lest he totally destroy the Effect of his Execution. *Supersedeas* are frequently granted either *quia improvide*, or *quia erroneè emanavit*; and

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in many Cases Restitution is awarded on irregular Entries, and Reversals by Error. All which Matters I have largely and distinctly treated of, for your better Direction in these weighty Matters, and prevention of Miscarriages in the Management thereof.

I have explained the Nature of Executions in several Rules, and treated of the several Sorts of Executions at Common Law and by Statute Law; and to what time Execution shall relate as to Land and Goods.

I have Treated of *Scire facias* in general, the Reasons and Use thereof, and more particularly of *Scire facias* on *Recognizance* against the Bail, and *Process* hereupon.

I have largely handled *Statutes* and *Recognizances*, and the several Sorts and Kinds of them, and *Process* upon them, and of *Elegits*, *Extents*, *Liberate*, &c.

I have inserted the Pleadings under each Title, with the Returns of Sheriffs.

And you have here the Explication of many Acts of Parliament relating to Executions.

I have been as intire upon the Subject as I could possible be, according to

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the best of my endeavour, and have omitted nothing material relating thereunto, as well out of Old as Modern Reports, such as *Ventris*, *Levins*, *Lutwyche*, &c.

I have not indeed stuff'd it up with the Forms of the several Writs (which are very many) but rather leave the Student to search them in *Natura Brevium*, *Brevia Selecta*, *Officina Brevium*, Second Book of Judgments, *Modus Intrandi*, and others, being the Storehouses thereof.

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S. C.

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C A P. I.

The Nature of Execution explained by several Rules. By what Words Execution is released or not. How Execution must be pursuant to the Judgment; of Execution without Satisfaction. Where the Committitur must be proved, and how. Who shall have or sue Execution. Executor, Baron & Feme, Administrator de bonis non, &c. Against whom to be Sued, as Persons attainted. Against the King's Debtor. Stat. 25 Ed. 3. c. 19. explained. Against Infants. Against a Lord of Parliament. Against a Bailiff on Account. Against Baron & Feme. Against Executors and Administrators. Against Clericum Beneficiatum. Against the Heir. Against the Bail.

EXecution briefly is the obtaining the actual Possession of a thing gotten or awarded, and recovered by Judgment of Law.

B

The

Diversity
between
Action and
Execution.

The Diversity between an Action and an Execution is, the Action is properly to continue till Judgment given, and after Judgment is given the Action is at an end: And after Judgment then doth Process of Execution begin. The Foundation of the first is an Original Writ, and doth determine by the Judgment. And Writs of Execution are called Judicial, because they are grounded upon the Judgment.

Reg. 1.

The Consequence of which is, that Regularly a Release of all Actions is no Bar of Execution. And a Man may plead to an Action, but not to a *Cap' ad Satisfaciend'*, *Elegit*, or *Fieri Fac'*, and yet if any Matter arise since the Judgment to discharge him of Execution, he may have an *Audita Querela* and so relieve himself, but plead he cannot; as if the Plaintiff after Judgment release to the Defendant all Executions, yet in none of these three Writs can he plead it, but he is driven to his *Audita Querela*, in which Action the Party is discharged on Bail, because it is a new Suit.

By what
sort of a
Release
Executions
are Barred,
or not.

Reg. 2.

If a Man release all Suits the Execution is gone, for *no Man can have Execution without Prayer or Suit but the King only*, and therefore if the King release all Suits it is no Bar of his Execution, because in the King's Case the Judges ought to award Execution *ex Officio* without any Suit; but a Release of Execution Bars the King.

A Release of all Debts or Duties doth discharge the Execution, because the Debt or Duty in it self is discharged; by release of
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the Judgment in Debt the Body of the Defendant in Execution by *Ca' Sa'* shall be discharged of the Execution.

Executions are favoured in Law. We ^{Reg. 3.} favour them saith the Lord Chief Justice *Bridgman* in *Toothill* and *Rawlin's Case*, It is a Process that issues from our selves, therefore Regularly Judicial Writs shall not abate by the Death of one of the Plaintiffs. *Carter's Rep.* 194.

None can have Execution upon a Judgment or Recognisance, but they that are Parties or privy to the Record. *Vide infra.* ^{Reg. 4.}

Execution must be in pursuance of the ^{Reg. 5.} Judgment, and may not vary. *Vide infra*, *Scire fac. Wharton* and *Sir Edward Musgrave's Case*.

To this purpose is *Barker and Piggot's* ^{Execution must be in pursuance of the Judgment.} *Case*, 1 *Leon.* 68. *Barker* brought Debt against *Piggot*, Executor of the Will of *E.* Executrix of the Will of *R.* Defendant pleads that he had fully administered the Goods of his Testator *E.* upon which they were at Issue, and it was found for the Plaintiff; it was moved in Arrest of Judgment; here is not any Issue joined, which answers to the Action, for the Action is brought against the Defendant as Executor of an Executor, and the Verdict extends to the Defendant but as Executor of *E.* for it is found by it that the Defendant hath fully administered the Goods of his Testatrix, without any enquiry of the Administration of the Goods of the first Testator *R.* in which Capacity the Defendant is charged. *Per totam*

The Law of Executions.

Cur'; here the Court shall give Judgment as upon *Nilil dicit*, in which Case the execution of the Judgment shall not fall upon the Goods of the last Testator according to the Verdict, but shall follow the nature of the Action which was brought against the Defendant as Executor of an Executor. So 15 H. 7. 6. If a Man recover in *Affize* against three of Land and Damages, he may not sue Execution by *Capias* against one only for the Damages, but it ought to go against all, for that the Execution ought to be according to the Original, *per Cur'*.

Reg. 6.
Once discharged of
Execution
and always
so.

A person once discharged of Execution, shall not be in Execution again. Therefore an Infant being in Execution upon Condemnation in Debt, brought a Writ of Error, his Father and his Brother were his Bail. *Per Cur'* they only shall enter into the Recognizance that the Infant shall appear; and that if the Judgment be affirmed, that they shall pay the Money, and not that they should render the Body of the Infant again to Prison, for that when once he is discharged of Execution he shall never be in Execution again. 3 Leen. 113. *Tucker* and *Norton*. And if one be in Execution they cannot Supersede it by Error, but he must continue committed, else there would be no remedy to bring him into Custody if Judgment should be affirmed: But in *Audita Querela* the Party is discharged by Bail, because this is a new Suit, and the Parry is never to be taken again. 2 Keb. 43. the King against *Whitmore*, *Godbolt* 371.

Execution

The Law of Executions.

5

Execution is to be done in the right place, Reg. 7. and against the same Person, and against the same Goods of the Party, or else Trespass lies against the Sheriff. *March 97. Stiles 238.*

Execution without Satisfaction is no Bar Reg. 8. to Debt on Bond; Defendant pleads that one *J. W.* was bound with him jointly and severally in the said Bond, and that the Plaintiff recovered against him and had him in Execution upon *Cap' ad Sat'*, and that such a Sheriff *libere & voluntarie* permitted him to go at large. *Et hoc, &c.* and Demurrer, and adjudged *pro Quer.* And although he escaped by the voluntary permission of the Sheriff, as is pleaded, so as the Party is entitled to an Action against the Sheriff, yet that shall not deprive him of his other remedy against the Obligor. *Cro. Car. Whitacre and Hawkinson, p. 75.*

To whom directed.

The Execution was made by Precept to the Serjeants at Mace, without special Name; which, *per Curiam*, is the constant course.

Committitur. Vide infra plus.

A *Committitur* need not be proved by the Record in Court, being only in an Action, Where the *Committitur* must be proved and how. but in that case the Entry in the Marshal's Book is sufficient; but in Execution it must be proved how the Party became a Prisoner. So said in *Linch and Damorets Case. Hill. 16 & 17 Car. 2. B. R.*

Escape af-
ter Com-
mittitur
entred.

It was moved that a *Committitur* entred upon the Roll should be vacated, to the intent that the Party not yet being in Custody shall be at liberty to take what Execution he will; but if the Party after such *Committitur* entred be in the *Marshalsea*, and then escape, the Marshal shall be charged for the Escape, and not before; for the entry of it upon the Roll shall not so charge the Marshal. 1 *Syd.* 220. *Cony* and *Jacob*, 1 *Keb.* 775.

The several Sorts of Executions.

Some divide them into Exe- } Personal.
cutions } Real.

Personal, for Debt or Damages; as *Levari facias* and *Fieri facias* by the Common Law; *Elegit* by the Statute of *W. 2. c. 18.* *Capias ad Satisfaciendum* at Common Law; in *Trespas*, *Vi & armis*; and by the Statute of 25 *Ed. 3.* in Debt and other Cases.

But I shall in the first place treat of Executions in general, as,

1. Who may have Executions or not, and in what respects.
2. Against whom Executions may be brought or not.
3. Out of what Court they are to issue:
4. To what Places they shall go or not, and how.

And then descend to Particulars.

Who

Who shall have or sue Execution.

If a Man make *A.* his Executor, with Condition that if he do such an Act that *B.* shall be his Executor, and after dies, and after *A.* recovers in Debt, and after does the Act, it seems *B.* shall have a *Scire fac'* upon this recovery. *Mich. 7 Jac. sed quer. 1 Rol. Abr. 889.*

If Administrator *dur' minori etate* of an Executor recover in Debt, and after the Executor comes of full Age, he shall have a *Scire fac'* upon this recovery, because he is privy to the Judgment. *Mich. 9 Jac. B. Margaret Wright's Case, per Cur'.*

If a Feme Covert Executrix to *J. S.* takes Husband, and after the said Husband and Wife bring Action of Debt upon Bond in right of the Wife Executrix to *J. S.* against *J. D.* and have Judgment against him to recover the Debt with Damages and Costs, and after the Wife dies before Execution sued, the Husband shall not have Execution upon this Judgment, for that he shall not have the thing recovered (tho' he be privy to the Judgment) but it appertains to the succeeding Executor or Administrator of *J. S.* Adjudged upon Demurrer. *Beaumont and Long, 1 Rol. Abr. 889.*

If a Man recover Arrears of Rent all in Damages, his Executor shall have Execution of it, and not the Heir, for by the recovery it is a Chattel Vested.

On Reco-
very in
Waste.

Upon a Recovery in Waste the Heir shall have Execution of the Land, and the Executor of the Damages.

Baron and
Feme.

If the *Baron & Feme* recover Land and Damages, and the Husband dies, the *Feme* shall have Execution of the Damages.

Where tho
one reco-
ver he shall
not have
Execution.

Scire fac upon a Judgment given in Debt for *Baron & Feme*, as Administratrix to her former Husband, the Feme dies after Judgment, and the Husband brought a *Scire fac*, and upon the *Scire facias* returned obtained a Judgment by *Nil dicit*; Execution was staid; for the Debt being due to the Feme as Administratrix, although the recovery be by the *Baron & Feme*, she being dead the Baron may not have Execution upon this Judgment, for the Debt was due to the Wife *en auter droit*. Cro. Car. 464.

Goods are
Attached,
and before
Tryal may
be taken in
Execution
at another
Man's Suit.

If by the Custom of a Vill a Man may Attach the Goods of his Debtor, and that these Goods shall be put in Execution if the Suit pass for him, and he Attaches the Goods accordingly, yet before the Tryal of the Action, if another had Execution against the same Man, these Goods may be taken in Execution, for he shall have all the Property that the Owner had (*viz.*) to have the Goods if the Suit pass against the Plaintiff, or the Overplus if any be. *Darson and Ironmonger* in Camera Stellata.

*De bonis
non*, Ad-
ministrators
shall not
have a Li-

Administrator *de bonis non* may not have a *Liberate* upon an Extent sued by the Executrix of the Intestate who died before the Extent returned, and the *Liberate* sued; for the

the Executrix suing it as Executrix to the Testator, and she dying Intestate, this Writ is sued by the Administrator who comes Paramount her, and claiming immediately from the first Intestate, cannot upon this Extent be sued by the Executrix and have the *Liberate*, but he ought to commence *de novo*, and procure a new Certificate, and a new Extent and *Liberate*. *Cro. Car.* 451 *Clere & Vere*; but by the Statute of 17 Car. 2. c. 8. if the Administrator obtain a Verdict, and Judgment, and dies, the Administrator *de bonis non, &c.* may sue Execution upon the said Judgment. 2 *Sanders* 149.

Judgment in Debt on the Statute of 14 H. 8. by the President of the Colledge of Physicians, who died before Execution had, and the Successor brought a *Scire fac.* and good, for the President having recovered in the right of the Corporation, the Law shall transfer that Duty to the Successor of him who recovered, and not to his Executors. *Cr. Fac.* 159. *Dr. Atkins and Gardner*.

Against what Persons or not.

Against a Person Attainted.

Execution may be had and made upon a Man Attainted of Felony, against his Body and Goods, *Owen* 69. and Debt was brought against the Sheriff if he Escapes. *Crofts* was bound to *Ognell* in a Recognizance, and afterwards

Debt on
Escape.

terwards was committed to *Newgate* for Felony, of which he was Attained, and remained in Prison in the Custody of the Sheriffs : Afterwards *Ognell* sued a *Scire facias* upon the Recognizance against *Crofts* ; the Sheriffs returned *Cepi*, and the special Matter aforesaid, and after Judgment given against *Crofts* for *Ognell* ; *Crofts* got his pardon and escaped. *Ognell* brought Debt upon the Escape ; and the Court gave Judgment for the Plaintiff, for notwithstanding this Attainder, *Crofts* is subject to the Execution upon the Recognizance. 1 *Leon.* 276. *Ognell's Case*, and the Sheriff had returned *Cepi* upon the Process.

One Attainted of Felony not to be discharged of Execution. As to Actions he may.

T. Attainted of Felony was removed by *Habeas corpus* out of the *Tower of London*, into *B. R.* Upon the return of the *Habeas corpus* it appeared he was detained in Prison on Execution, and for divers Actions. *Per Cur.* As to the Execution he shall not be discharged, for then the Party should lose his Debt for ever ; but as to other Actions he ought to be discharged, for a Man so Attainted ought not to be put to Answer, nor to be taken in Execution ; but the Reporter saith, the Justices of the Common Bench, and the Barons of the *Exchequer* were of a contrary Opinion. 3 *Leon.* 326, 327. But this Case is reported by *Owen* thus, *T.* was attainted of Felony upon Outlawry, and after Execution is sued against him at the Suit of a common Person, and he is taken upon it ; he brought his *Habeas corpus*, and because he was indebted to many

The Law of Executions.

11

many Persons, and to discharge himself from his Creditors, intended to have a pardon and so to deceive them; the Court committed him to the *Marshalsea* upon this Execution. *Owen 151. Trussell's Case.*

But this seems to be settled more clearly in *Raymond's Rep. p. 59.* B. was committed to the *Marshalsea* for divers Misdemeanors, and he being in Prison for the said Offences was charged with Actions and Judgments obtained against him; the Court was moved that he might be discharged of these Actions. It was resolved, when a Man is charged with criminal Matters he is not chargeable with a civil Action without leave of the Court; but if he happen to be charged, *factum valet*, but they ought to have moved the Court first; but if once charged cannot be discharged, and much to this purpose is this Case reported by Mr. *Siderfin*, The Defendant being taken by Process of Contempt out of the *King's Bench* was committed to the *Marshalsea*, and he was there charged with several Actions and one Execution, of which he moved to be discharged, for as much as he was only taken for a Contempt. *Per Cur.* he shall not. *Fieri non debuit qd. factum valet. 1 Sid. 90. Rowland and Belling.*

Attainder shall not extinct the Debts of Subjects, and if it be purged by Pardon, the Execution of all other Duties are revived.

One

The Law of Executions.

One Arraigned and Condemned of Felony; Execution at the Suit of a common Person is delivered to the Sheriff against him, the Sheriff may choose to serve the Execution or not, for the King hath an interest in the Body; but if he do, it is good. *Moor's Rep.*

Against the King's Debtor.

Explicat. Stat. 25 Ed. 3. c. 19.

How, and
in what
Cases a
common
Person
shall take
the King's
Debtor in
Execution.

Protection.

S. being in Execution for a Debt due to the King, was Condemned in B. R. in Debt by a Judgment, and was brought to the Bar by *Habeas corpus* to be charged in Execution for this Debt also. For it is appointed by the Statute of 25 Ed. 3. c. 19. that a common Person shall not have Execution against the King's Debtor until he makes Agreement for the King's Debt, and then he shall have his Debtor in Execution and detain him till he hath made satisfaction of the Debt due to himself, as also the Debt which he paid for him to the King; and of that Opinion was all the Court. But for as much as he had not a Protection, the Court resolved that he is out of the Statute, and thereupon awarded that he should be in Execution, as well for the Party as the King. *Cro. Car. 389. Stephenson's Case*, and so is *Fitz-herbert N. B.* No Execution shall be sued against the King's Debtor, who hath a Protection: If the King's Debtor is in Execution at anothers Suit, he himself may

may shew he is the Kings Debtor, and so be discharged ; but in that Case, if the Plaintiff will agree with the King, then the Party may have and keep him in Execution at his own Suit, and for his own Debt, as also till he hath satisfied him what he hath paid to the King. 1 *Inst.* 191. *Dyer* 191. but 15 *H.* 7. 8. The Defendant is to have a Protection to keep him from the Arrest of a common Person whilst he is in the King's Debt.

It was said by the Justices in *Ognell's Case*. 1 *Leon.* 276. That if he who hath a Protection from the King be taken in Execution and Escape, the Goaler shall answer for the Escape, and that it was one *Hales Case*.

Now tho' the King's Debtor be in Execution by his Body, or his Lands for the King, yet the Subject might also lay; or take him in Execution by his Body; for the Statute of 25 *Ed.* 3. c. 19. (where it is said the Subjects Execution shall cease till the King's Debt be satisfied) is to be understood of such Executions whereby the King may be prejudiced, as Lands or Goods. *Hob.* 115. *Q de hoc*, Sir Thomas Sherley's Case, he being under Execution was brought by a *Habeas corpus* to the Common Pleas Bar, by one who desired to have him charged in Execution by reason of a *Capias Cap. ul. utlagatum* after Judgment for Debt; but it was answered and agreed by the Court, that because the *Capias utlagatum* was at the King's Suit, and for the Subject but in the second Degree, the King might discharge his

The Law of Executions.

his own Suit, when the King does any Act to frustrate the Outlawry; but the King's Protection to his Debtor will not discharge this Suit, especially not being delivered or made known to the Coroners.

Against one in Custody for Crimes.

Sir John Jackson was fined and imprisoned for a Misdemeanour; he shall not be charged in Execution (nor no other which is so committed) without leave of the Court at the Suit of any Party; the same Law as to putting in Special Bail to Actions sued against him. *Siderf. 154.*

Against a Lord of Parliament.

It was agreed by all the Justices in the Lord Mountjoy's Case, That an Execution upon a *Stat. Staple, Stat. Merchant*, upon the *Stat. of Acton Burnell*, or upon the Statute of 23 H. 8. the Body of a Lord of Parliament shall be taken in Execution; for by those Statutes such Persons were not exempted. 2 *Leon. 174.*

F. was Arrested in Execution, 3 Feb. at 7 a Clock in the Morning, and the same Day at 10 a Clock he was elected Burgefs of Parliament. It was agreed in Parliament, because he was Arrested before he was chosen Burgefs, he could not have the Priviledge of the House. *Moor, Fitz-herbert's Case.*

Against

Against Infants.

No Execution may be sued against an Heir within Age, for Debt or Damages by *Elegit*, or by a *Stat. Staple*, *Merchant* or *Recognizance*, upon 23 H. 8. for it is excepted in the Process against the Heir; no Execution shall be against an Heir during his minority, albeit, the Heir is not specially bound, but charged as *Ter-tenant*; and if there be two Daughters that are Heirs to the Conusor, or Heir against whom the Judgment is, and one of them is within Age, no Execution can be of the Land till they be of Age. 1 *Inst.* 290.

An Infant was in Execution upon Condemnation in Debt, and he brought a Writ of Error, his Father and his Brother were his Bail. *Per Cur.* They only shall enter into the Recognizance that the Infant shall appear, and that if the Judgment be affirmed, that they shall pay the Money, and not that they should render the Body of the Infant again to the Prison, for that when once he is discharged of Execution, he shall never be in Execution again. 3 *Leon.* 113. *Tucker and Norton.*

Against Baron & Feme.

Debt was brought against *Baron & Feme*, upon Obligation made by the Testator of the Wife; and Judgment, and *Fieri facias*; and upon this a *Testatum Fieri facias*, Debt was brought against *Baron & Feme*, Where there is a *Devastavit* return-
ned against
and *Baron & Feme*

Feme, and
the *Feme*
dies, the
Husband
shall be
charged.

And if the
Husband
dies the
Wife shall
be charged.

and upon this a *Devastavit* was returned, and Judgment was for the Plaintiff to recover, and then the Wife dies; Error was brought to reverse the Judgment. And upon several Debates it was adjudged, that there was not Error in *Redditiōe judicij*, &c. but that the Husband is liable to this Execution, notwithstanding the death of the Wife. *Siderf.* 337. *Eyres* and *Coward*, and so it was resolved in *Mounson* and *Bourner's* Case; if there be a Recovery against *Baron & Feme* in a *Devastavit*, if the Husband survive the Wife he shall be charged, and if the Wife survive she shall be charged; so is *Jacobson* and *Charlton's* Case, 3 *Keb.* 205. in Debt against *Baron & Feme*, Executors on Obligation of *M.* to the former Husband, and a Verdict on *Devastavit* after *Scire facias* and *Fieri facias*, and Error and Judgment affirmed; the *Feme* alone was taken in Execution, she shall not be discharged, here being a Verdict of the Wast; and *per Hales* had the Wast appeared to be during the Coverture by her, yet she alone might be taken in Execution.

If Debt on Bond be brought against *Baron & Feme*, and Judgment, and then the Wife dies, yet the Husband shall be charged. *Siderf.* 337.

If *Baron & Feme* obtain a Judgment in Debt in the right of the Wife, and the Wife dies; yet the Husband shall have Execution upon this Judgment, because the Debt is altered by the Judgment, *ibid.*

Judgment

Judgment against the Lady *Prettyman* as Sole, and she pleaded she was married before Judgment, and it was prayed that she might be discharged of the Execution; and a new *Scire fac'*. *Per Cur'*, She might have pleaded this above upon the *Scire fac'*, but now being taken in Execution they cannot ease her till Sentence in the *Spiritual Court* for the Marriage, but she might with her Husband bring a Writ of Error, and assign this for Error. In Trespass against *A. B.* and several others, *A.* being Covert all brought a Writ of Error, and for it the whole Judgment was reversed. 3 *Keb.* 13. *Marshal* and the Lady *Prettyman*, and the Court would not suffer the Husband to release the Error.

If a *Feme Covert* be taken in Execution, she shall not be discharged but by Writ of Error.

The Defendant *Feme Covert* prayed to be discharged of a *Cap' Excommunicat'* returned in *B. R.* for non-payment of Costs on Libel against her for Incontinence, being not within the Statute of 5 *Eliz.* cap. 23. §. 12. which the Court agreed, and the *Capias* discharged. Some conceived it was not avoidable but by Plea. 3 *Keb.* 836. *Dom. Rex & Coates.*

Excom' cap' against *Feme covert* for non-payment of Costs.

Execution against Executors and Administrators. Vide 5 *Rep.* Cases of Executors.

If *A.* recover by Judgment Debt against *B.* the Executor of *C.* and after *B.* dies Intestate, upon which Administration of the Goods of *C.* is granted to *E.* In this Case *E.* is liable (upon a *Scire faciās*) to this Judgment; for he comes in under the Judgment; and there

Admini-
strator *de*
bonis non.

is great diversity between Judgment had by an Executor; for there the Administrator of the first Man comes paramount the Judgment; and where the Judgment is had against an Executor. *Mich. 5 Car. 1. B. R. Norgate and Snape. Vide late Statute supra.*

Execution against the Administrator after the Death of the Intestate of the Intestates Goods, is good. *Park against Moss and How. 1 Leon. 144.*

If one acknowledge a Statute, and after a Judgment is had against the Conusor; now against the Conusor the Statute shall be preferred, but not against an Executor. *Goldsb. 1, 36. in Fletcher and Robinson's Case.*

Execution
of the
Goods of
the Testa-
tor after
his Death.

This Case is thus reported by *Moor*. In Trover, Recovery was had in *Scaccario* against the Executor of one P. of Debt and Damages, and a *Fieri facias* Issues *de bonis Testatoris, si non, damna de bonis propriis*; Executor dies, the Sheriff makes Execution of the Goods of the Testator before the return of the Writ, and adjudged good notwithstanding the Death after the *Teste* of the Writ. *Moor 302.*

Stat' paid
before a
Judgment.

Judgment is given against B. in Debt in *Com. B.* and after the Judgment B. enters into a Statute to J. S. and dies Intestate, the Wife takes Administration, and removes the Record of the Debt recovered against her Husband by Error: And hanging this Suit pays the Debt upon the Statute to J. S. and after the first Judgment is affirmed; and after on *Scire facias* against the Administrator to have Execution she pleads the Statute, paid

paid, *ultra quod*, &c. *Per Cur'*, a good Plea, and that the Payment of the Statute was no *Devastavit* : For at the time of the payment of the Statute, she could not plead the Judgment in *C. B.* because it was in doubt whether it should be affirmed or not ; and then it was no default in her to pay the Statute, for she could not have *Audita Querela*, nor no other remedy. *Yelv. 29. Rede and Bearblock. Vide this Case, Cro. Eliz. 734, 822.*

Execution against a Bailiff on Account.

By the Common Law he shall have but a *Levari facias*, or a *Fieri facias*, 3 *Rep. 12.* and this within the Year only, for if the Year be past, he was put to his Action of Debt; by *W. 2. cap. 45.* a *Scire fac'* is given after the Year; by *W. 2. cap. 18.* *Elegit* is given.

By *Marlbr. 23 & W. 2. c. 11.* *Capias* is given in Process, and by consequence a *Cap' ad Sat'* after Judgment.

By *Sta. W. 2. c. 11.* if an Accountant be found in Arrears before Auditors, he shall be committed by the Auditors to the next Goal in Execution.

Against Baron & Feme.

Debt upon a Statute entred by the Wife *dum sola* against *Baron & Feme*; it was reported by the Secondary that all the Presidents are, that unless the Wife be arrested;

Where the Husband shall put in Bail for his Wife, or not. or the Husband give Bond for the Appearance, he shall not be forced to put in Bail for both, if he will lie in Prison, but else he shall before he can be bailed; and the course is, the Husband must put in Bail for both, tho' he was never arrested. *H. 13 Car. 2. B. R. Cranmer and Andrew's Case.*

Wife taken in Execution by practice.

Upon a Judgment confest by the Husband alone, of Debts contracted after the Marriage, as if they had been contracted *Dum sola*; as *Drake's Case B. R.* by which practice the Wife was taken in Execution; but notwithstanding the course of the Court, that the Wife taken alone should remain till the Husband comes in, the Court discharged her, and conceived such Custom unreasonable. *Palmer against the Lady Chaworth, M. 13 Car. 2. B. R.*

Judgment by confession of the Husband.

B. procured *I. S.* to Sue him and his Wife in an Action for Goods taken away by her, and had Judgment by confession of the Husband; but the Court set it aside as illegal; but if it had been tried on Issue, *I. S.* might have taken both. *1 Keb. 637. Bradley and his Wife.*

Feme in Execution not discharged by Affidavit that she was Covert.

Levins in Hanfey and Sander's Case prayed, that a Feme Covert in Execution might be discharged on Affidavit, that at the time of the Bond she entred into as Feme sole and Judgment thereupon as Sole, tho' she was a Feme Covert; *sed non allocatur*, this being for Rent of an House taken by her as Sole, and in the Lady Prettyman's Case, the Court did not determine it by Affidavit.

Against

Against a Clerk, Clericum Beneficiat'.

On recovery in London, and *nulla bona* returned, but that he is *Clericus Beneficiatus* in the Diocess of Ely, and thereon went a *Fieri facias* to the Bishop of Ely on a *Testamentum*, and he returned that he had *nulla bona Ecclesiastica*; it is a good return, and the Plaintiff may have his Action on the Case if *faux*, and he need not Return a Sequestration though he admit him to be *Clericus Beneficiatus* by the return, and the Court agreed the *Fieri facias* well directed to the Bishop, and not to the Sheriff. *Trin. 18 Car. 2.* *Fieri fac'.*
B. R. Bicard and Payton. Vide Rolls Abr.

In *Bond and Baylie's Case*, Wray took this Diversity difference where the Judgment is given against the Testator himself, and where a Judgment is against the Executor; for where the Judgment is against the Testator himself, and the Judgments are given against Executors, the Judgment which was given before shall be first executed, but if Judgments are given against the Testator, he who first sues Execution against the Executor shall be first satisfied, where against the Executors, because they are things of equal nature, and before suit it is at the Election of the Executor which he will pay first. *1 Leon. 328.* See the next page.

In Debt Judgment was given in *B. C.* against two Executors, to recover the Debt *de bonis Testatoris*, upon which a *Fieri facias* was awarded to the Sheriff to Levy the Debt *de bonis Testatoris*, &c. upon which the Sheriff returns *nulla bona*, &c. upon this Return

Inquisition by the Sheriff of Wast, and upon Wast returned *Scire fac'*, &c. Q if this be the course now.

turn an Entry was made in the Roll, for that *Testatum est* that the Executors have sold divers Goods of the Testators, and converted the Money to their own Use; a Writ was awarded to the Sheriff to inquire *per juramentum*, &c. what Goods of the Testators at the day of his death were wasted by the Executors, and it was found that divers Goods of the Testators, to the value of the Debt recovered were wasted by the Executors, and this was returned; upon which the Plaintiff pursues a *Scire fac'* against the Defendant to shew cause why Execution should not be awarded of their proper Goods, and upon 2 *Nibils*, the Court awarded Execution. *Per Cur'*, its Error in *redditione Executionis* (in B. R.) for when Judgment is given against Executors, and upon the *Scire facias* the Sheriff returns *nulla bona*, &c. the Plaintiff may have a special Writ of *Fieri facias*, (*viz.*) that the Sheriff levied the Debt of the Goods of the deceased, & *si sibi constare poterit* that the Executors have wasted, then *de bonis propriis*; but this seems not to be Law, and the course is constantly *contra*. vide *Cro. Car* §19.

Execution against the Goods of the Executor for Debt *in jure proprio* is a *Devastavit nolens volens*. 3 Keb. 839.

Wives goods as Executor to her former Husband taken in Execution.

Levins moved to stay Execution of Goods in the Sheriffs Hands being the Wives, as Executrix to her former Husband, and taken for the present Husband's Debt; but the Court denied it, because by the payment

ment of the Debts of the former Husband these Goods may be the Wife's own, and the Court will not try this on *Affidavit*. *Hoile and London's Case*.

Note, If one appears by the name of Baronet who is not one, yet Execution may be against him by the same Name. *1 Rol. Rep. 450. Sir Francis Fortescue's Case*.

Execution against the Heir.

If the Judgment in Action of Debt against an Heir be general upon *Riens per discent* pleaded, and it is found against him either by Confession, without shewing what Assets he had, or upon *Non sum Informatus*, or *Nibil dicit*; the Execution may be general also as to have Execution of the moiety of all his Land. *Dyer 149.*

But in an Action of Debt brought against the Heir, if the Defendant acknowledge the Action, and shews the certainty of the Assets, and upon this Judgment is given to recover the Debt to be levied of the Lands descended; there the Plaintiff shall have a Writ of Execution to levy this of all the Land descended, and not only to have a moiety, as upon *Elegit*. *Vid. ibid. Vid. Baker and Brown infra.*

No Execution shall be by *Elegit* against an Heir during his minority, albeit the Heir is not specially bound but charged as Terre-tenant; So against an Heir within

The Law of Executions.

Age, no Execution shall be sued upon a Statute-Staple or Merchant, nor upon Recognisance on 23 *H.* 8. for it is excepted in the Process against the Heir.

The Heir
to be an-
swerable
though he
make over
the Land
before A-
ction
brought.

By the Statute 3 and 4 *W. and M. c.* 14. Where any Heir at Law shall be liable to pay the Debt of his Ancestor in regard of any Lands descending to him, and shall make over the same before any Action brought, such Heir shall be answerable for such Debts to the value of the Land made over, in which case all Creditors shall be preferred as in Actions against Executors and Administrators; and Execution upon any Judgment so obtained shall be taken out against such Heir, to the value of the Land, as if they were his own Debts, saving that Lands *bona fide* aliened before the Action brought shall not be liable to such Execution. *Vide* by the same Statute.

Where
Writ of
Enquiry of
the value
of the
Lands, or
not.

Where any Action of Debt upon a Specialty is brought against an Heir, he may plead *Riens per descent* at the time of the Original Writ brought, and the Plaintiff may reply he had Lands from his Ancestor before the Original brought; and if upon Issue joined thereon it shall be found for the Plaintiff, the Jury shall enquire of the value of the Lands descended, and thereupon Judgment shall be given, and Execution awarded as aforesaid: But if Judgment be given against such Heir by Confession, without confession of the Assets descended, or upon Demurrer or *Nihil dicit*, it shall be for the Debt.

Debt and Damages without Writ of Enquiry of the Lands.

If Judgment general be given upon *Riens per discent* pleaded, *Nibil dicit*, Confession without shewing Assets, or upon *Non sum informatus*, although the Plaintiff may have Execution by an *Elegit* of the moiety of all his Land, yet it seems that he may at his Election surmise that he had such Land by discent, and pray to have Execution of all that Land. For otherwise if the Plaintiff should not have this Election, but is put to his *Elegit* general, then he should have but a moiety in Execution, and perhaps the Heir had not any other Land besides the Assets. *Elegit, Election.*
Vid. per ceo, Dyer 149.

It was a good Nicety in Sir William Herbert's Case, 3 Rep. In Debt against the Heir upon Obligation made by his Ancestor; the Plaintiff by the Common Law (before any Statute subjected the Land to Execution) should have all the Land in Execution which descends to him, yet he shall not have Execution of any part of the Land against the Father himself; the reason was, because the Common Law gave Action of Debt against the Heir, and in such Case if he shall not have Execution of the Land against the Heir, he shall not have any fruit of his Action, for the Goods and Chattels of the Debtor belong to his Executors or Administrators, and so for necessity in such case the Land was only liable to Execution of a Debt of a common Person at Common Law. 3 Rep. 12.

Debt

The Law of Executions.

On *Riens*
per *discent*
pleaded.

Assets.

Debt is brought against one as Son and Heir upon the Obligation of his Father, who pleads *Riens per discent* the Day of the Writ purchased, *nec unquam postea*: The Plaintiff avers Assets by discent in London, in the Parish, &c. The Plaintiff in Evidence gives Assets in Cornwall, and Good, and this for Necessity. He ought to name a Place certain, otherwise there can be no Tryal, and the Jury may find Assets by discent in any other County in England; for the Law is, the Plaintiff shall have Execution of all the Lands which the Heir had, and perhaps he has Lands in divers Counties. 6 Rep. 47. Dowdale's Case.

Judgment
and Execu-
tion gene-
ral.

Debt against the Heir on the Obligation of his Father, the Judgment against him was by *Nihil dicit*, Execution was awarded by a *Capias ad Satisfaciend'*, whereas the Lands only descended unto him ought to have been put in Execution, and not his Body nor his other Lands. *Per Cur'*, its not Error; for the Judgment and Execution shall be general, unless the Heir acknowledged the Action, and shews that he hath so much by discent, as was *Trewinnion's* Case. Plowd. 440. Dyer 344.

But when the Heir will not shew that he hath so much by discent, and so loseth the Benefit which the Law gives to him, it shall be intended he hath Assets to satisfy, and in this Case Execution shall be Sued against the Heir as his proper Debt. Cro. Eliz. 692. Baker and Bourne.

Execution

Execution against the Heir of *cestuy que* Trust made
Trust : For a Trust in Fee simple descend- Assets.
ing shall be Assets by descent ; but the Heir
shall not by reason of any kind of Plea or
Confession of the Action, or suffering Judgment by *nient dedire*, or any other matter,
be chargeable to pay the Condemnation out
of his own Estate, but Execution shall be of
all the Estate so made Assets in whose hands
soever it shall come, *per Stat. Frauds and*
Perjuries.

In a *Scire facias* against one Joint-tenant
surviving without the Heir of the other on
Judgment in Debt against both ; by the
Common Law on such Judgment in Debt
(3 Rep. 14.) the Charge shall survive, and the
Statute of W. 2. that gives the *Elegit*, tolls not
the Privilege of the Party at Common Law,
because it was made for the Plaintiffs be-
nefit ; and the Difference is between the *Lien* Lien real,
real, which must be equal, and *Lien per-* Lien per-
sonal, which may be of any of them. *Plowd.* sonal.
440. 11 H. 7. 12. b. Warranty real will not
survive, personal will, 1 *Inst.* 469. But this
cannot be done after Execution returned,
without *Audita Querela* ; after the Death of
the Survivor he must charge all the Ter-
tenants. *Judgment pro Quer.*, 1 *Keb.* 92, 123.
Smart and Edsey.

Of Execution against the Bail.

Process, vide infra Scire facias *against the Bail.*

In what Cases if the Bail be taken in Execution, the Principal may be taken in Execution or not.

After Bail
taken in
Execution,
no resort-
ing to the
Principal.

If the Bail be once taken in Execution the Plaintiff shall never have after this Execution against the Principal; and it is the Law and Common Practice, that if a Man take the Bail he cannot afterwards resort to the Principal, because he hath lost his Election by taking the Bail in Execution. But if there be two Bails, and he hath Execution for the moiety against one of them, he may afterwards resort to the other, and have Execution against him for the other Moiety. 2 *Bulstr.* 68. *Higgins and Somerland.*

Bail pays
part, Exe-
cution a-
gainst the
Principal
for the re-
sidue.

But in *Felgate and Mole's Case*, 1 *Syd.* 107. if Execution be taken against the Bail in *B. R.* and they pay part, the Plaintiff may after take Execution against the Principal for the residue, the Bail being let at large before the taking of the Principal, and this is the constant practice of the Court; and it seems *Higgins's Case* above-mentioned, and in *Cro. Jac.* 320. is to be intended where the Bail was in Custody.

If

If the Principal in discharge of the Bail render himself in *B.R.* to the Tipstaff of that Court in the Morning of the last Day of the Return of the Second *Scire Facias*, and after dinner the same Day the Tipstaff brings him to a Judge of the said Court, who commits him to Prison in Execution in discharge of his Bail, but this is not entred of Record till another day; but then it is entred as committed the last Day of the Return; tho the Clerks of the Court said that if he render himself, or was committed after Dinner, this is not sufficient to discharge the Bail; yet in as much as the time of his Commitment does not appear on Record, but only that he was committed such a Day, the Court shall intend that he was committed in the Morning according to Law in discharge of his Bail. *Owen and Griffith, 1 Rol. Ab. 334.*

When the Bail upon render of himself to be committed.

If *A.* be Bail for *B.* in *Banco per* Recognizance acknowledged by him, and after Judgment given against *B.* for Damages and Costs, and after a *Scire facias* is sued upon the Recognizance against *A.* and Judgment is had upon it against him, an Action of Debt lies upon this Judgment against *A.* and if he hath Judgment in this he may take his Body in Execution upon it, tho' he might not take his Body in Execution upon the Judgment in the *Scire fac.* *Rigalt and Carrick.*

An Action of Debt lies upon Judgment on Recognizance, &c.

Note, If the Defendant in an Action in *C. B.* find Bail, and after Judgment against him and *Capias* awarded, if he be not rendered

Render in

The Law of Executions.

dred before the *Cap.* returned *non est Inventus*, and filed, yet he may render himself after the return and filing of it, and save the Bail.

Render in
B. R.

But in *B. R.* if the Principal render himself to Prison after the *Capias* against him returned *non est inventus*, and this is filed of Record, this shall excuse his Bail by the Course of the King's Bench.

So in the *King's Bench* or *Common Bench*, if the Principal render himself after the return of the *Cap.* and after the first *Scire facias* awarded against the Bail, and before the return of it; this shall discharge the Bail.

At what
time the
Principal
must be
brought in
to Excuse
the Bail.

The Bail in discharge of himself may bring in the Principal at any time before the return of the second *Scire facias*; but after the Day of the return of the second *Scire facias* against the Bail past, altho' this second *Scire facias* is not filed of Record, yet the return Day being past, the bringing in of the Principal afterwards shall not excuse the Bail. 1 *Rol. Ab.* 334. *Vawde* and *Avis's Case*.

The Bail
brings the
Principal,
hanging
the Writ
of Error
brought by
one of the
Bail.

If *A.* and *B.* are Bail in an Action in *B. R.* for another, and after Judgment against the Principal, he brought a Writ of Error in *Cam' Scacc'*, and hanging this Writ of Error the Bail brought in the Principal, or the Principal render himself in Prison, altho' the Recoveror may not pray him in Execution, nor may the Court put him in Execution, for that the Writ of Error is a *Super/edeas* of it, yet

yet this is a good discharge of the Bail, for the Marshal may keep him in Prison as a Pledge, until Judgment be affirmed or disaffirmed, as he may upon mean Proceſs in default of Bail. *Cotton and Obbury, Calſ. and Dingly.*

Note, If A. becomes Bail for B. at the Suit of C. and after C. recovers againſt B. and after the Cap' is returned againſt B. non eſt invent', and this filed of Record, and after B. dies before any Scire facias ſued out againſt A. yet this ſhall not excuſe A. the Bail, in as much as B. is dead after the Capias and Return filed, and yet he might have brought in B. had he been alive, in his diſcharge before the ſecond Scire facias returned, but this is Ex gratia Cur', 1 Rol. Ab. 336. Trukley and Booth, 2 Crok 165.

Principal
dies before
Sci'fa' ſued
againſt the
Bail.

Otherwiſe, had he been dead before the Cap. returned and filed; and the death of the Principal before the return of the Cap' diſchargeth the Bail.

If the Principal render himſelf in *Exonerationem manucaptorum*, this ought to be entred on Record. *Hob. Welby and Commings.*

Of Render vide Pleading puis.

If the Principal after Judgment render himſelf in Court in diſcharge of his Bail, and the Plaintiff will not take him in Execution, and all is entred on Record as it ought,

ought, yet the Plaintiff may after take him in Execution, *per Cap' ad Satisfaciend'*, for this was but the forbearance of him for a time upon his own offer, and not a renouncing or a releasing of his Execution. *Hob. of Pleading reddidit se; Vide puis tit' Recognizance.*

C A P.

C A P. II

By and out of what Court Execution shall be awarded. How the King's Bench shall grant Execution upon a Judgment in inferior Court of Record. Diversity between removal of a Record out of an inferior Court by Certiorari and by Writ of Error. Diversity as to awarding of Execution super tenorem Recordi. To what places Execution is to go, or where to be sued. County Palatine. Wales. To the Cinque Ports. Ireland. In what place to be executed regularly. Newgate a Prison for London and Middlesex, and how.

IF a Recovery be in a Court Baron; they Court Baron. have no power to make Execution for the Plaintiff of the Goods of the Defendant, but they may distrain the Defendant, and retain the Distress in their Hands in safeguard until he had satisfied the Condemnation. 4 H. 6. 17. b.

If a Man recover in an Inferior Court of Record Debt or Damage, and after remove the Record into the King's Bench by How the King's Bench shall grant Execution upon a Judgment in inferior Court of Record. Certiorari, it hath been a Question in *Peachy* and *Foster's Case*, Whether the Court of King's Bench be bound in this Case to grant Execution upon this Judgment? But in *Levins* 134. it is resolved, Judgment in Inferior Court being brought into B. R. by Writ of Error and affirmed, Execution shall issue out of B. R. for now it is a Judgment of the King's Bench :

Diversity between removal of a Record out of an Inferior Court by *Certiorari* and by Writ of Error.

Bench : But a Judgment in Inferior Court brought hither by *Certiorari* shall not be executed here, to make this Court (of *B. R.*) subservient to the Inferior Court ; but upon such Judgment removed in *B. R.* by *Certiorari* Debt may be brought in this Court.

Demurrer by one, and Issue by another on a Recognizance in *Chancery*.

A single Demurrer in *Chancery* is always used to be adjudged there on a Recognizance ; but if there be a Demurrer by one and Issue by the other, of necessity the Issue ought to be transmitted to this Court, and so must the Demurrer ; for if the Issue should be sent into this Court, and the Demurrer retained in the *Chancery*, there would be two Judgments in two several Courts upon one and the same Record ;

Two Courts cannot join in making out one Execution.

and yet the Plaintiff ought to have but one Execution by one *Elegit* upon both Judgments ; and out of what Court shall he have it, for two cannot join in making out one Execution. 2 *Sand.* 25, 26, 27. *Jeffery's Case*.

Diversity as to awarding Execution *super tenorem recordi*.

As to what Court shall award Execution *super tenorem Recordi* observe this diversity.

If a Man recover in *B. R.* and upon this an Attaint is brought in *B. C.* where the first Verdict is affirmed, no Execution may be awarded in *B. C.* for that they have but *Tenorem recordi* there. *Hill.* 37 *El. B. per Cur⁹*, *York and Allen's Case*.

But in this case Execution may be awarded in *B. R.* for there the Record it self continues, *Id. Case*.

Note,

Note by Hales, If the Tenor of a Fine be certified upon a *Certiorari* out of the Tower, or Treasury, into the Chancery, and sent into the Common Pleas by *Mittimus*, Execution may be awarded upon the Tenor. *Vide Allen* fo. 17.

In some Cases the Court has been disabled to award Execution, but afterwards has been reinabled; as in *Hob. 116. Wickstead and Bradshaw*, The principal was called to the Bar by a *Habeas corpus*, procured by the Bail on purpose to save themselves, and the Plaintiff prayed that he might be committed in Execution, and also the Bail, that he might be received in their Discharge: But it appeared to the Court that the Defendant had brought a Writ of Error allowed, and the return of it not yet come; so that the Court was disabled to award Execution to put him in Execution; but afterwards the Defendant was brought again by *Habeas corpus*, and the Plaintiff prayed him in Execution, and it was granted, the Day, of the Return of the Writ being past, and he had not caused the Record to be removed, and so the Court was re-enabled to award Execution.

Court disabled to award Execution, but afterwards re-enabled.

To what Places Execution shall go, and where to be sued.

As to this we must first note a Diversity, as it was taken in *Herbert and Alcock's Case*.

D 1

There

Diversity
between
a Writ of
Error, up-
on which
a Judg-
ment is af-
firmed, and
a Record
removed
out of In-
ferior Court
by *Certi-
orari*.

There is a Diversity between a Writ of Error upon which a Judgment is affirmed, and a *Certiorari* to remove a Record, for when Judgment is affirmed in a Writ of Error, this adds strength to the former Judgment, so that Execution may be sued on it throughout all *England*; but when a Record is removed out of an Inferior Court by a *Certiorari*, and is sent into one of the Benches by *Mittimus*; there no Execution can be sued in any other place, than from whence it is removed. *Hut.* 117, 118. 1 *Levins* 134. 1 *Sid.* 213. and the Recognizance was well removed in Error to Reverse a Judgment in the *Pallace Court*.

County Palatine.

Execution may well issue out of *B. R.* into a *County Palatine*. Goods were levied be *Fieri facias*, out of the *King's Bench* in the *County Palatine* of *Chester*, upon a Judgment originally in *B. R.* and upon such Judgment a *Fieri facias* lies to the *County Palatine*; and if a Judgment in *Chester* is removed by Error here (in *B. R.*) and affirmed here, Execution may Issue out of this Court. 1 *Levins* 25.

Wales.

It was a Question in the Court of Wards: Judgment is given in Debt at the Grand Sessions in *Wales* against a Defendant

dant inhabiting in one of those Counties, and the Defendant dies Intestate, and one who inhabits in *London* takes Letters of Administration, whether any Execution may go into *Wales*, because he neither inhabits there, nor hath any thing there. If not, then whether that Record may be removed into the *Chancery* by *Certiorari*, and sent by *Mittimus* into *B. R.* or *B. C.* to the intent to take out a *Scire facias* upon it, to have Lands out of *Wales*, or Goods in the Hands of the Administrator liable to it there; and all the Justices and Barons held it could not be, for one may not have a *Scire facias* in any Court, but where the Judgment is given; and if such course should be used, all Judgments in the Courts in *London*, or in Inferior Corporations would be removed and executed here, which would be a great inconvenience to the Subjects to make Lands or Persons liable to such Judgments, in other manner than they were at the time of the Judgments; wherefore there is no remedy, but to execute such Judgments in their peculiar Jurisdictions.

Where Judgments to be executed with in their peculiar Jurisdictions.

But a great Quere hath been, Whether upon a Judgment obtained in *B. R.* or *B. C.* Execution may go into *Wales*, and it hath been held by many it doth. 2 *Bulstr.* 156. *Mich.* 1653. *Wynn and Griffith's Case.* Execution goes into *Wales* as into any part of *England.* 2 *Bulstr.* 54. *Hall and Rosheram.* *Capias ad Satisfaciend'* shall go into *Wales* against the Bail, upon a Judgment

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recovered in *B. R.* against the Principal. Notwithstanding the common Saying, *Breve Dom' Regis non currit in Walliam*, a *Fi' fac' Ca' Sa'* or any Execution whatsoever may issue into *Wales* upon a Judgment obtained here. In *Bulst.* The Sheriff of *Radnor* upon a *Fieri facias* directed to him, made this return, *Breve Dom' Regis non currit in Walliam*, and he was amerced 10*l.* for his false Return. *Atkins* and *Windham* were of this Opinion, and *Vaughan* were against it. 2 *Mod.* 10. *Whitwrong* and *Blaney.* 2 *Keb.* 410.

To the Cinque Ports, and how.

Hacker and *Harison* brought Debt against *T.* as Heir, and he pleads *Riens per descent*, and it was found by the County of *Sussex* that he had Assets in the Cinque-Ports, and shews where, and Judgment general was given against the Defendant, and the Plaintiff had several *Elegits* to have Execution of a Moiety of his Lands generally, and not specially, as of Lands descended to him. And the Writ was awarded to the Constable of *Dover Castle* to extend the Moiety of the Lands in the Cinque-Ports; and other Writs of common Course into the County where, &c. but the Plaintiffs were compelled first to have a *Certiorari* to remove the same Records into the *Chancery*, and from thence by *Mittimus* to be sent to the Constable to make Execution of this Judgment. 1 *Anderson* 28. *Herbert* and *Alcock.*
Execution

Execution goes not into the *Isle of Man*,
for that is no part of *England*.

Ireland, and how.

Ejectment was brought in *B. C.* in *Ireland*, and on Issue Judgment was *pro quer'*, and the Judgment was reversed in *B. R.* in *Ireland* for want of an Original. Sir *John Comins* brings a Writ of Error in *B. R.* in *England*, and the Judgment given in *B. R.* in *Ireland* was reversed, because the matter was discontinued. It was moved to have the Record remanded into *Ireland* with a Certificate of the Judges reversal here. But *per Cur'*, the Record shall not be remanded for the Writ of Error which goes out of *Chancery* here to the *King's Bench* there commands the Record to be sent; but if the Record had been reversed upon the Verity of the Matter, though the Judges here cannot award Execution, because they have no Officer there subject to their Command, yet they shall make a Mandate to the Chief Justice there to see Execution done. *Relo.* 117, 118.

And so it was agreed the Chief Justice here may command the Chief Justice of *Ireland*, to do Execution of Lands there against Manucaptors or other Persons; and if the Roll here be not marked till the Return of the Writ, the Common Bail shall stand but only to save Amerciaments; but if the Court see Cause they may award special Bail; also if the Plaintiff sheweth

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Cause at the Return of the Writ he may have special Bail though the Roll be not marked, but then the Defendant must have notice of it by the Course of the Court; also sufficient Bail of *Irishmen*, whose Estates were there, was allowed good. *1 Keb. 104.*

In the Bishop of *Ossorie's* Case, Judgment was given in *B. R. in Ireland*; within two days after the Defendant delivered to the Chief Justice a Writ of Error purchased out of the *Chancery in England*, returnable in *B. R. in England*. *Per Cur^a*, the Writ is a *Superfedeas* *Superfedeas*, though the Record it self be not sent, but a Transcript. *Dodderidge* said, the Record it self is not sent, because the Sea is between *England and Ireland*, and if the Transcript should miscarry they might again resort to the Record, but if the Record miscarry the Case is lost. *Cro. Jac. 534.*

At what Place it shall be executed.

Damages in Action of Waste, the Writ to levy it, to whom to be directed. If a Man recover Damages in Action of Waste in one County, the Writ to levy this shall issue to the Sheriff of the same County where the Action was first brought, and not to any other; but if this Sheriff return that he had nothing, he shall have Execution into any other County where the Recoveror will. *29 Ed. 3. 9. b.*

Recognizance of Bail on Original in London. If a Recognizance of Bail be taken by a Judge of the *Common Pleas* at *Serjeants-Inn* in *London*, upon an Original brought in *London*,

don, and this is certified into the *Common Pleas* and there enrolled, but it appears on Record that it was taken as before, a *Scire facias* may be awarded upon this Recognisance to the Sheriff of *London*, where the *Capias* was, for there was the Commencement of it. 1 *Rol. Abr.* 891. *Johns versus Lee and Pomeroy.*

Manucaptors for *Rice Edwards* upon a Recognisance of Bail, and in the said Case the *Scire facias* may be awarded to the Sheriff of *Middlesex.* Vide in 1 *Rol. Abr.* 891. Several Cases there cited.

If Land and Damages are recovered in ancient *Demesne*, the Damages may not be levied upon the Land held of the Manour, which is Frank Fee ; for this is out of the Jurisdiction. 7 *H. 4.* 29.

If a Man recover against another in *B. R.* Debt or Damages, and he against whom the Recovery is is in Prison in the *Fleet*, he may not be taken in Execution upon this Judgment in *B. R.* by a special Writ to the Warden of the *Fleet* to retain him in Execution for this Debt, without bringing his Body into *B. R.* by *Habeas Corpus*, so tho' the Warden return him *Languidus in Prisona.* 1 *Rol. Abr.* 894. *Serjeant and Brook.* Q. by the late Statute.

Upon a *Capias ad Satisfaciend'* to the Sheriff of *Middlesex* to take *J. S.* if the Sheriff take him and put him in *Newgate*, which is the common Prison for *Middlesex* and *London* ; and after another Writ of Execution comes to the Sheriff of *London*, although

Body to be brought into *B. R.* by *Habeas Corpus* to charge one in the *Fleet.*

Newgate a Prison for London and Middlesex.

The Law of Executions.

though the Sheriffs of *London* are also Sheriffs of *Middlesex*, and *Newgate* (where the Prison is) is the Prison for both Counties, yet the Prisoner shall not be said to be in Execution upon this new Writ in *London*, nor may the Sheriffs of *London* serve it upon him, for that he is in another County. For when the Commitment is to *Newgate* by force of a Writ to the Sheriff of *Middlesex*, he may not be said in any respect to be within the County of *London*; for the Counties continue several, and the Prisons several in respect of the several Commitments; for there are two several sides, and a partition between them. 1 *Rob. Abr.* 894. *Coa's Case*.

C A P. III.

When and at what time Execution shall be sued out presently, or not till some time after. 1. In respect of Pleadings and Issue. 2. In respect of a Writ of Error. 3. In respect of the Principal and Bail. 4. In respect of Death. Where there are two Judgments, upon which of them Execution shall be awarded. To what time Execution shall relate as to Lands. To what time as to Goods and Chattels. Where of Lands the Defendant had at the Day of the Nisi-prius. At the Day of the Inquest taken, where the first Day of the Term. Where from the time of the acknowledgment in case of Recognizances. The Statute of Frauds and Perjuries as to this. Chattels bound from the time of the Execution awarded. Relation to the Teste, from what time the property of the Goods shall be bound by Execution. Statute of Frauds and Perjuries as to this.

IF a Man recover in B. R. by award of the Court, and upon this the Roll is signed by the Clerk for Judgment, he may have Execution there presently before the Judgment entred, for otherwise he should be at great delay, for the course of the Court is not to enter Judgment till the Vacation after; and the Defendant is not at any mischief, for he may have a Writ of Error, after the Signing and before the

Upon signing the Roll.

When the course is to enter Judgment.

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the Judgment entred. *M. 15 Jac. B. R. Smith and Bowles*, this is the common course of the Court.

In respect of Pleadings and Issue.

In Debt if the Defendant acknowledge the Action for part, and for the residue pleads to Issue, whereby the Plaintiff hath Judgment for that which is acknowledged, yet he shall not have Execution till Issue tried, because he is to recover Damages for that which is acknowledged, which shall be assent upon Trial of the Issue. 18 H. 6. 26.

But if he release the Damages he shall have Execution presently.

So if the Plaintiff be after Non-suit in the Issue, he shall have Execution, for now the cause of impediment being removed, the Damages cease.

In respect of the Writ of Error.

Error was brought in the *Exchequer chamber* to reverse a Judgment given in *B. R.* and this Writ was brought in the time of the late Chief Justice, who is now Dead, and by him Signed, but the Record was not certified, nor any Writ of Error brought. *Per Cur'*, After eight Days they will give Rules in the Office, (*viz.*) of the Clerk of the Papers to take Execution, if during that time the Record is not certified, for they may certify the Record and make

Where the
Record is
not certi-
fied.

make all good, because the Writ of Error was Signed, *aliter* if it had not been Signed, it had then been abated by the Death of the Chief Justice. 1 *Siderf.* 268. *Allen* and *Shaw's* Case. Writ of Error signed by the Chief Justice not abated by his death.

And it is said in *Marsh* and *Whetston's* Case, If a Man bring a Writ of Error upon a Judgment, but does not remove the Record in six Days time; after Execution shall be granted, because it is apparent the Writ of Error was brought merely for delay. Error upon a Judgment in Debt, where the Judgment was affirmed, it was held by all the Justices, and so the Clerk said was their usage; that the Defendant in the Writ of Error shall have Execution presently without *Scire facias* altho' the Year and Day be passed since the Judgment. *Cro. El.* 456. *Goodwin* and *Gawdys* Case. Record not removed in six Days time.

In respect of the Principal and Bail.

After a Render of the Principal the Plaintiff hath three Days to charge him in Execution, or to take a *Fieri facias* against his Goods, but before Election the Bail are discharged by the Render. The Case of *Die* and *Adams* was on motion by the Bail for restitution of Money levied by them in *London, G.* the Attorney being paid 10 s. to enter a *Reddidit se*, but omitted it. *Per Cur'*, The Money was restored, and the Attorney ordered to enter the *Reddidit se*, being paid for it. 2 *Keb.* 512. The Plaintiff hath 3 Days to charge the principal in Execution upon the Render.

In

In respect of Death.

Execution
served on
the Goods
after the
Defendants
dth.

Execution was taken out by *Fieri fac'* last Term, on Warrant of Attorney to confess a Judgment and served after the Defendant's Death which was in the Vacation; this was not irregular, *Per Cur'*: But may be so served the Goods being bound by the *Teste* of the Writ. 2 *Keb.* 257. *Drinkwater and Knight.*

Where there are two Judgments, upon which of them Execution shall be awarded.

If after Judgment and Execution awarded *Audita Querela* is brought by reason whereof Execution is superseded; here if it be found against the Plaintiff in the *Audita Querela*, the Party shall have Execution awarded upon the Judgment in the *Audita Querela*, and not on the first Judgment. 1 *Sid.* 14. Some say he hath Election.

The Executor himself could not have Execution within the Year without a *Scire facias*, because he was not Party to the Record; and this is observable, he doth not then take out Execution, when removed by *Scire facias* upon the first Judgment, but he hath a Judgment in the *Scire facias* upon which he goes. 2 *Inst.* 470.

Relation

Relation.

To what time Execution shall relate as to Lands.

If Judgment for Debt or Damages are given in *Banco* upon a Trial by *Nisi prius*, at the Day the Plaintiff shall have Execution of the Land which the Defendant had at the day of the *Nisi prius*; for this and the Day in *Banco* are but one Day in Law. *Dyer* 149.

So he shall have Execution of the Land the Day of the Inquest taken; but he shall not have Execution of the Lands that he had the Day of the Writ purchased. 29 *Ed.* 3. 27. At the Day of the Inquest taken, not at the Day of the Writ purchased.

If a Man recover a Mannour he shall have all the Arrearages incurr'd mesne between the Recovery and Execution. 48 *Ed.* 3. 61.

If a Man acknowledge a Recognisance before a Judge of the *King's Bench* or *Common Pleas* out of Court, as at *Serjeants Inn* out of Term, and afterwards this is entred upon the Roll of the Record in the same Court where he is Judge. Now tho' it be not a perfect Record till it be entred upon the Roll, yet when it was entred it is a Recognisance from the first acknowledgement, and binds the Person and Lands of the Conusor from the acknowledgment of the Recognisance; for it is a Recognisance from that time. It is the acknowledgment before a Judge that gives it the force of a Record, though the Inrolment be necessary for the Testification. Recognisance binds the Person and Lands from the time of the acknowledgment.

fication and perpetuating of it. *Hob. 195. Hall and Winkfield.*

Execution of the Land If a Man recover Debt or Damages, he shall have Execution of the Lands he had the first Day of the Term in which he recovers; for the Term is but one Day in Law.

If a Man recover Debt, he may sue Execution of any Land that he had at the time of the Judgment, though he had aliened it before Execution. *30 Ed. 3. 24.* So of any Land that he had purchased after the Judgment, altho' he had aliened it before Execution.

Statute of Frauds and Perjuries. By the Statute of Frauds and Perjuries, any Judge or Officer of any of the Courts at *Westminster* that shall Sign any Judgment, shall (without Fee) set down the Day of the Month or Year of his so doing upon the Paper Record which he shall Sign, which shall be entred upon the Margin of the Roll of Record of the said Judgment, and such Judgment as against Purchasers, *bona fide* for valuable Consideration shall be a Judgment from such Signing.

Recognisance to bind Lands of Purchasers from the time of the Inrolment. And by the same Statute it is enacted, That the Day of the Month and the Year of the Inrolment of Recognisance, shall be set down in the Margin of the Roll, and no Recognisance shall bind Lands in the Hands of Purchasers *bona fide*, and for valuable Consideration, but from the time of such Inrolment.

Note, In the *King's Bench* Judgment doth not refer to the first Day of the Term, but to the Day of filing the Bill. *2 Levins 180.* But *vide* the late Statute. *To*

To what time Execution shall relate as to Goods and Chattels.

If a Man recover against *J. S.* and sue Execution by *Fieri fac'*, the Chattels which *J. S.* had at the time of the Execution awarded are liable to the Execution. *Hill.* Chattels at the time of the Execution awarded.
11 Jac. Cummin and Bradlin.

As if after Execution awarded against *J. S.* *J. S.* dies, yet the Sheriff may afterwards execute the Writ on the Goods in the hands of his Executors or Administrators, in as much as the Goods were bound by the Award of the Execution. *6 H. 7. 6.* Execution good after the Death of him against whom Execution is.

So if a Man recover against *I. S.* as Executor of *W. S.* of the Goods of the deceased, if he had, &c. and *si non, de bonis propriis*, and sue Execution accordingly by *Fieri fac'*; and after, before the Execution made by the Sheriff, *I. S.* dies, the Sheriff, if he does not find any Goods of *W. S.* the first Testator, he may execute the Writ on the proper Goods of *I. S.* which he had at the time of the Execution awarded; although that now they are in the hands of his Executor or Administrator; without suing a *Scire fac'*, for as much as they were bound by the award of Execution. *Mich. 31 and 32 El. Mosse and Howe, B. R.*

If an Executor sell any Goods to another pending the Action against him, and before Judgment, these Goods shall not be taken in Execution, for they were lawfully bought. *9 H. 6. 57. b. Curia.* Sale of Goods pending the Action, and before Judgment.

E

In

Relation to
the *Teste*.

In *Wangford's Case* the Plaintiff had recovered against the Defendant in Action of Debt, and had Execution against the Defendant after the Day of the *Teste* of the *Fieri facias*, and before the Sheriff had meddled with the Execution of the Writ, *bona fide*, for Money sold certain Goods and Chattels, and delivered them to the Buyers. *Per Cur'*, notwithstanding the said Sale the Sheriff may do Execution of these Goods in the hands of the Buyers, for that they are liable to the Execution; and Execution once granted or made shall have relation to the *Teste* of the Writ. 1 *Leon.* 304. *Vide* and Q. the Statute of Frauds *infra*.

Before the
return of
the *Fi' fac'*
the Plain-
tiff becomes
a Bankrupt,
not assign-
able by the
Commis-
sioners.

A Verdict *pro Quer'*, and after Money levied by the Sheriff, as Executor, and before the return of the Writ, the Plaintiff becomes a Bankrupt, and the Money recovered was assigned by the Commissioners by the name of the Plaintiff's Money to the Creditors. *Per Cur'*, the Money in the Sheriff's hand is not assignable, though by the Judgment the Damages and Costs were ascertained and turned in *rem Judicatam*; for it cannot be said to be the Plaintiff's Money till it be paid to him, and in the mean time it is in the hands of the Sheriff, *quasi in custodia Legis*; and none can give a discharge thereof but the Plaintiff, who is Party to the Record, and he only can acknowledge Satisfaction. *Cro. Car.* 176. *Benson and Flower.*

No Writ of Execution shall bind the Property of Goods but from the time of its delivery to the Sheriff, Under-Sheriff, or Coroners, who upon receipt thereof (with out Fee) shall indorse on the back thereof the Day of the Month or Year when they received it; see the Statute of Frauds and Perjuries. Though the Law was, That Goods were liable from the time of the *Teste* of the *Fieri facias*, and this shall be said *Emanatio brevis*, although it be in fact from another time. 1 Syd. 271. Bayly and Bunning.

C A P. IV.

In what Cases a Man shall be in Execution before Prayer or not. Where the Plaintiff may make Election, whether the Defendant shall be in Execution or not. In what Cases a Man shall be in Execution upon Prayer before Habeas Corpus sued by Committitur entred or not. Where the Execution must be actual and not barely by Committitur. Where Reddidit se may be pleaded, and how. In what Cases Execution with satisfaction against one shall serve for the other, and how the other shall be remedied. Elegit by Execution against one. Execution against the Principal, if he may after have Execution against the Bail, &c contra. In what place a Man shall be said to be in Execution. Execution, where it shall be joint and several. In several good Cases with several Diversities.

IN Debt against J. S. if the Defendant be taken upon a *Latitat*, and committed to the *Marshal* for default of Bail; and after the Plaintiff recover against him he continuing in Prison, yet he shall not be in Execution by this Judgment before Prayer of the Plaintiff. *M. 4 Jac. 1. Carr and Copping's Case.*

If a Man recover Damages in Action on the Case against J. S. in B. R. the said J. S. being in *Custod' Marr'*, yet he shall not be in Execution on this Judgment altho' it

it be within the Year, before the Prayer of the Plaintiff, for the *Marshal* may not take notice of every Judgment against every Prisoner, but upon Prayer of the Plaintiff a *Committitur* shall be entred upon the Roll, and then he is in Execution.

H. 12 Jac. B. R. Sir *Henry Bellows* and *Handford's Case*.

Committitur entred upon Prayer.

If a Man recover in Debt and Outlaw the Defendant after Judgment, and after within the Year the Defendant is taken by *Capias Utlegat'*, he shall be in Execution for the Plaintiff before Prayer, for that the Outlawry was at the Suit of the Party.

On Outlawry.

5 Rep. 88. Garnon's Case.

Otherwise it is if he be taken in Execution after the Year, because there he cannot have a *Capias* against him. *H. 38 El. B.R. Norton and Sharp's Case, Hob. 115.*

But if a Man recover in Debt and Outlaw the Defendant after Judgment, and after within the Year the Defendant is taken by a *Capias Utlegat'*, altho' he be in Execution for the Plaintiff *prima facie*, yet he may make an Election that he shall not be in Execution for him. *M. 43 & 44 El. B. R. Shaw and Cuttereffe's Case.*

Where the Plaintiff may make Election, whether Defendant shall be in Execution, or not.

If a Judgment be given against *J. S.* who is in the *Fleet* a Prisoner there, and after the Warden of the *Fleet* informs the Court of *Chancery*, that the said *J. S.* is in Ward of the *Fleet* for certain Causes; upon which the Court commands the Warden to retain him in Execution until satisfaction of the Judgment, yet *J. S.* is not in Execution

Election.

upon the Judgment, because this was not at the request of the Plaintiff, but done without his Prayer, for it may be he will elect another Execution. *Dyer* 306.

Judgment
against the
Principal,
who ren-
dered him-
self, but
they re-
fused to
take him
in Execu-
tion.

In Case. The Defendant put in Bail to answer to the Action : Judgment was given against him, he came into Court and rendered himself, and prayed, that in discharge of his Sureties, that the Court would Record the rendring of himself, which was granted ; and the Court demanded of the Plaintiff if he would pray Execution for the Body against the Defendant, who said he would not, whereupon the Court awarded, that the Sureties should be discharged, and the Rule was entred, that the Defendant offered himself in discharge of his Sureties, and *Attornatus querentis allocatur per Cur', &c. dixit se nolle. Ideo considerat' fuit per Cur' quod tam præd' Defend' quam præd' manucaptiores de Recognitione præd' & denariis in eadem contentis exoneretur.* 1 Leon. 58. Fullwood's Case.

A *Cap. ad Sat.* was delivered to the Sheriff, and afterwards the Sheriff arrested the Party against whom the *Capias* issued by force of a *Capias Utlegat'*; and then the Party in the *Capias* came to the Sheriff, and prayed that the Party remain in Execution for his Debt also ; and notwithstanding that the Sheriff let the Prisoner go at large, and upon both Writs returned *non est inventus* ; by all the Justices, the Sheriff was not bound in point of Escape to detain the Prisoner for the Plaintiffs Debt :

Debt: And it is not like where one is in the Fleet in Execution, there if other Condemnations in other Courts be notified to the Warden of the Fleet, he shall be chargeable with them all; and also *per Cur'*, if the Body had been returned by *Capias Utlegatum*; the Court at the Prayer of the Party will grant that the Prisoner might remain in Execution for the Debt, as in the Case of a *Capias pro Fine*. 1 Leon. 263.

Hodges sued a *Ca. sa.* against one in the County of C. who was brought into Court in the Custody of the Sheriff, where the said *Hodges* was personally present; and it was demanded of him by the Court, if he would Pray that the Prisoner should be committed to the Fleet, who said he would not Pray it, and this he did because the Prisoner was poor and not able to pay, and had escaped out of the Custody of the Sheriff, against whom he said he intended to bring his Action, upon which the Court discharged the Prisoner of the Execution, and of the Custody, not committing him to the Fleet, nor leaving him in the Custody of the Sheriff, because the Sheriff did not Pray it. 1 Anderson 118.

In what Cases a Man shall be in Execution upon Prayer, before a Habeas Corpus sued by Committitur, entred or not.

If a Man recover in *Banco* Debt and Damages against *J. S.* and had Judgment, altho' that *J. S.* be a Prisoner for other Causes in the *Fleet*, and the Warden informs the Court of it, and the Court commands him to retain him in Execution till Satisfaction of the Judgment; yet he is not in Execution, for that he was not brought to the Bar by a *Habeas corpus*, and viewed and demanded of the Prisoner if he be the same Person which is condemned or not, which is the Office of the Court to oppose him.

One committed in Execution tho' the Cause be removed, and why.

If *A.* recover against *B.* by Judgment in *B. R.* and upon this *B.* renders him to Prison, and after brought a Writ of Error, and had a *Supersedeas*; yet afterwards upon Prayer of the Plaintiff, the Court may commit him in Execution altho' the Record be removed, because he had not found Bail upon his Writ of Error. *p. 9. Car. B. R. Symond's Case.*

If Execution by default be awarded in a *Scire facias* upon a Judgment in Debt, and the Defendant after the Year and Day, (*viz.*) *A.* was in the *Fleet* for other Causes, and by a *Habeas corpus* was brought to the Common Bench, and being opposed by the Court, whether he was the Person that was condemned *ut supra*, and he granted

granted it, he shall be committed in Execution at the Prayer of the Plaintiff, altho' it be after the Year and Day. *Dyer* 214.

It was prayed, that the Defendant going abroad by Rule, might be brought into Court by Rule to be charged with Actions, in regard the Opinion of the Court is, That in such charges the Plaintiff must prove the Defendant actually in Custody, and not only by *Committitur* entred on the Roll, which the Court granted, or that the Marshal shew the Prisoner to the Plaintiff. Where it must be actual.

1 *Keb.* 764. *Dickenson* and *Prestwych's* Case.

The Court in *Conny* and *Jacob's* Case, conceived the entry of a *Committitur* alone, is sufficient Evidence to charge Sir *John Lenthall* Marshal, as in Execution for Escape of a Prisoner without actual proof of his being in Execution; but if he be so, altho' no Entry of *Committitur* be made in the Marshal's Book, he is chargeable. Also *Committitur* is but the Act of the Attorney, and so not sufficient to take *Capias*, or hinder other Executions to be taken against the Parties. 1 *Keb.* 775. *vide Sid.* 220. *vide supra.* Where it must be actual and not barely Committitur.

So is 1 *Rol. Rep.* 133. *H.* was in Prison of and Judgment was given against him in *B. R.* at the Suit of Sir *H. Bellows*. It was moved that for as much as it is within the Year by which a *Fieri facias* lies against him, whether he shall be in Execution also upon this Judgment without

out Prayer of the Plaintiff. *Per Cur'* not; for the Marshal cannot take notice of every Judgment, and the use is in such cases to make Entry *quod Committitur*, and then the Marshal is chargable with him, and not before. 1 *Rol. Rep.* 133.

Entry *quod Committitur*.

Note, The pleading of *Reddidit se* may be pleaded well enough without averring *prout patet*, &c. for it is only filed with the Bail piece, entred into at the Judges Chamber, upon which the Secondary writes a *Reddidit se*, and so the Party goes to the Marshal into Custody, and thence returns to the Secondary, and he enters a *Committitur in exoneratione manucaptoris*; and if this Render be before the return of the second *Scire facias* on the Bails Recognizance, it may well enough be pleaded *prout patet*; and this is the Course of the Court.

Where *red-didit se* may be pleaded, and how.

In what Cases Execution with Satisfaction against one shall serve for the other.

Execution with satisfaction against one Trespassor.

In several Courts.

In Trespass against Three, and one is Condemned, if the Plaintiff had Execution against him with Satisfaction, it shall be a Bar against the others. 3 *Jac. B. R. Hickman and Machin.*

So if for a Trespass by two, several Actions are brought against each in several Courts, and recovery against them, yet if the Plaintiff have Execution against one, this shall Bar him against the other. 14 *H. 4. 22. b.*

But

But in this Case the Plaintiff may sue Execution against the other, and he is put to his *Audita Querela*, by which he shall be aided.

The same Law it would be in this Case, although the Recovery was in the same Court, it being upon several Writs; for the other upon the Execution lastly sued, may not plead the first Execution, and the Records are several, and therefore he hath no other remedy but by *Audita Querela*. *Aud Quer'.*
Per 3 Jac. B. R. Hickman and Machin.

But it was agreed in *Die and Adams's* Case, where two are jointly bound, and one is taken in Execution, and pays the Money on Judgment against both, and after the other is taken, he may be discharged by motion without *Audita Quer'*. 2 Keb. 512. *Die and Adams.*

If a Man bring several Actions in one Court against one, and recover; and another Action against the other, and recover; if he sue Execution against the one with Satisfaction, he shall not have Execution against the other. 14. H. 4. 22. b.

If a Recovery be by several *Præcipe's* against two in a Debt upon one Obligation in which they are bound jointly and severally; if the Plaintiff sue Execution against one with Satisfaction, he shall not have Execution against the other also. 14 H. 4. 22. b.

In Debt upon an Obligation against two, if 5 l. Damages are assessed to be recovered of each of them severally according to the Writ; So in case of Recovery of Damages.

The Law of Executions.

Writ ; if the Plaintiff sue Execution against one, and hath Satisfaction, he shall not have Execution against the other. 14 H. 4. 19. b.

When two are bound in an Obligation jointly and severally, and the Obligee sue one of them in C. B. and the other in B. R. *Cap'* against and had against him in B. R. a *Capias*, and one, and took him in Execution, and after took an *Elegit* against the other, and had Lands and Goods delivered in Execution, as he might well, that thereupon the other in Execution by his Body had an *Audita Querela*, and was delivered. The only Doubt in this Case was, Whether legally the Defendant might have a new Execution by *Capias ad Satis* after that he had Execution against one of the Obligors by *Elegit* : And the cause of the Doubt was, for that the Judgments upon which he grounded his Executions were given at several times, and in several Courts, and against several Persons ; for it was agreed by the whole Court, that a *Capias* doth not lie after Execution sued by *Elegit* against the same Person ; but after a *Capias* an *Elegit* is grantable, and the reason of the difference is upon the Prayer to have the *Elegit*, there is a special Entry upon the Roll, *Elegit sibi Executionem per medietatem Terre*, so as he is stopped by the Record to have another Execution ; but upon a *Capias* nothing at all is entred upon Record. And, *per Coke*, it is a common Practice of a good Attorney to defer the Entry in the Roll of Execution

Cap' lies not after Execution sued by *Elegit* against the same person ; but after a *Cap'* an *Elegit* is grantable. Reason of the Diversity.

cution upon an *Elegit*, until the Sheriff that returned hath served it. *Per Cur'*, *Legat* might sue *Cowley* and *Bates* severally, and after Judgment he might chuse his Execution against which of them he pleased, but he could not have Execution by *Elegit* Execution against them both, and therefore though by *Elegit*. there be an eviction of the Land, or that the Judgment be reversed by Error, after that he hath Execution against one by *Ele- Plaintiff* *git*, yet *Legat* could not have Execution takes out against the other; for by the first Execu- *Elegit* a- tion he hath determined his Election, and gainst one. he could not sue the other. *Hob. p. 2.* *Casus incerti nominis & temporis*; but in *Godb. 259.* and *1 Rol. Abr. 896.* it is *Cowley* and *Legat's Case.* *Rol. Rep. 8. Godb. 83.*

If a Man once had Execution against the Bail of *J. S.* he shall not after have Execution against *J. S.* the Principal; for he hath made his Election by the first Execution. *Per 10 Jac. B. R.* If one have Execution against the Principal, he cannot have it against the Bail.

So if one once sue Execution against the Principal, he may not after resort to an Execution against the Bail, for the cause aforesaid. *Ibid.* *Et è contra.*

But he may have Execution against one of the Bail, and after have Execution against the other also. *1 Rol. Abr. 89.* Execution against one Bail, and after against the other.

Two Men are condemned in Debt, and one was taken and dies in Execution, yet the taking the other was lawful. *5 Rep. 86. a.*

Where

Where and in what place a Man shall be said to be in Execution.

One in Execution in the Fleet for Debt recovered in B. R. How satisfaction to be acknowledged.

A Man being in Execution in the Fleet for a Debt recovered in C. B. he being before condemned for another Debt in the King's Bench, was now removed by a *Corpus cum causa*. *Per Cur'*, the Plaintiff may acknowledge Satisfaction for both Debts in B. R. for he is in the Custody of the Marshal for both; and if he escape, the Marshall will be charged for both. *Dyer 151.*

Vide supra, 1 Rol. Abr. how Newgate is a Prison for London and Middlesex.

Execution joint or several.

In respect of the *Præcipe* or Original.

If Debt be brought upon an Obligation against two upon a joint *Præcipe*, and the Plaintiff hath Judgment to recover, a joint Execution ought to be sued against both. But if the Suit were by one Original, and several *Præcipe*'s, Execution might be against either of them. *1 Leon. 412.*

Execution, where it shall be joint and where several.

Joint Recovery.

If a Man recover jointly against three, the Execution ought to be joint against them all. *Trin. 39 El. Adams and Dixon's Case.*

If a Man recover jointly against two in an Action of Debt, the Execution ought to be joint against both, and not against one sole. *Hill. 4 El. Beverly's Case.*

In

In Action of Debt against J. S. if two become Bail for him, and after the Plaintiff recover, and after Process continues until Judgment is given against the Bail, the Execution may be against either of the Bail without naming the other, for that each of the Bail is bound severally. *Adams and Dixon.*

How against the Bail.

If a Man recover in *Assise* against three of Land and Damages, he may not sue Execution by *Capias* against one only for the Damages, but this ought to go against all, for that the Execution ought to be according to the Original. 15 H. 7. b. *Per Curiam.*

Execution according to the Original.

If two are bound jointly and severally, and Judgment is given against them upon several *Præcipe's*, the Plaintiff shall not have a *Fieri facias* against one, and a *Ca' sa'* against the other, but ought to have but one manner of Execution against both. *Mich. 11 Jac. 1. B. 1 Rol. Abr. 904.*

Judgment against them that are bound jointly and severally upon several *Præcipe's*.

If Debt be brought upon an Obligation against two upon a joint *Præcipe*, and the Plaintiff hath Judgment to recover, a joint Execution ought to be sued against them both. But if the Suit were by one Original and several *Præcipe's*, Execution may be sued against any of them. 1 Leon. 288.

In an Information upon the Statute of Recusancy, if Judgment be given for 100 l. although the King is to have two Parts, and the Informer a third Part, yet there shall not be several Executions (*viz.*) one for the King and another for the Informer, but

One Execution for the King and Informer, and not several.

but one Execution for the whole. *Mich. 13 Jac. B. between St. Johns and Grevill.*

Capias against both, but not against one, and other Execution against the other.

Where two several Persons make but one Debtor.

If two be bound jointly and severally to me, and I sue them jointly, I may have a *Capias* against them both, and the Death or Escape of the one shall not serve for the other.

But I cannot have a *Capias* against one; and another kind of Execution against the other, because though they be to two several Persons yet they make but one Debtor when I sue them jointly; but if I sue them severally, I may sever them in their kinds of Execution; for though the Obligation be but one, yet the Originals, Suits, Pleadings, Judgments and Executions are so diverse as if they were upon several Obligations: Yet so, that if a very Satisfaction be had against one, or against the Sheriff upon an Escape of one, the rest may be relieved upon *Audita Querela. Hob. 59. Hob. 2.*

Sed unica tantum fiat Executio omitted in the Judgment.

Action of Debt against two by one Original, with several *Præcipe's* upon one Obligation, in which they are bound jointly and severally, and several Declarations are made against them, and several Judgments given; but these words, *Sed unica tantum Executio* were not put in the Judgment; Yet the Judgment is not Erroneous, because these words are but of Form, and for the Direction of the Clerk; for though these words are not entred, yet he should have but one Execution. *Trin. 12 Jac. B. R. Banks and Chamberlain. Vid. Syd. 339.*

C A P. V.

Execution by Capias against the Body. In what Cases a Capias lay at the Common Law, and in what Cases it now lies by the Statutes. The Nature of a Cap' ad Satisfac'. Of Cap' ad Satisfac' at the Suit of the King. At the Suit of a common Person. Writ of Protection. Stat. 25 Ed. 3. cap. 10. explained. No Execution by Capias in a Scire fac' on a Recognizance. Goods and Body not both liable at the same time. No Capias ad Satisfac', because no Capias lies in the Original Action. In several Cases where Execution shall not be by the Body. In what Case the Court cannot award Execution till reindabled. Where Capias ad Satisfac' is well or ill issued, or well or ill served. Return. Pleadings.

THere are three sorts of Executions respecting the Subject ;

Against the $\left\{ \begin{array}{l} \text{Body,} \\ \text{Goods and} \\ \text{Lands.} \end{array} \right.$

In what Cases Capias ad Satisfaciend' against the Body lay at Common Law, and in what Cases it now lies by the Statutes.

At Common Law where a common Person sued for Debt or Damages upon a Recognizance or Judgment, he should not
F have

have the Body of the Defendant nor his Lands (unless in some special Case) in Execution; but at Common Law he shall have Execution in such Case only of his Goods and Chattels, and of his Corn and other present Profits which grows upon the Land, for which purpose the Common Law gave two several Writs,

1. A *Levari facias*, by which Writ the Sheriff was commanded, *Quod de Terris & Catallis ipsius A. Levari faciat.*

2. A *Fieri fac'*, which was only *de Bonis & Catallis.*

And both these Writs ought to have been Sued within the Year after the Judgment, or the Recognizance acknowledged, and if he had not neither the one nor the other within the Year, the Plaintiff or Conussee was put to his Writ of Debt, and its said 13 H. 4. 1. the Body of the Defendant was not liable to Execution for Debt at the Common Law.

But in all Actions, *Quare vi & armis*, *Capias* lay at Common Law; and where *Capias* lies in Process there after Judgment a *Capias ad Satisfac'* lies, and the King shall have *Capias pro Fine.*

And at Common Law the Body, Lands and Goods of the Accountant of the King's Debtor, were liable to the King's Execution.

Now by the Statute of *Marlebridge*, c. 23. and *W. 1. c. 11.* *Capias* was given in Account; for at Common Law the Process in Account was Distress Infinite.

By

The Law of Executions.

67

By the Statute of 2 Ed. 3. c. 17. the like Process was given in Debt as in Account. And now in most other Actions.

The Nature of a Capias ad Satisfaciend'.

Execution of the Body by a *Capias ad Satisfaciend'* is not a Satisfaction of the Debt, but as a Gage or a Pledge for the Debt; and the words of the Writ of *Capias ad Satisfaciend'* are, *Capias J. de S. ita quod Habeas Corpus ejus coram Justiciariis nostris, &c. ad Satisfaciend' H. de K. de debito & damnis, &c.* So that his Body is taken to the intent that he shall satisfy, and when the Defendant pays the Money he shall be discharged out of Prison; so that this is not final nor absolute, and therefore if the Defendant in Debt die in Execution, the Plaintiff may have a new Execution by *Elegit* or *Fieri facias*, 5 Rep. 87. *Vid.* more of this *post Tit' What Execution after Execution*, and the Arguments on both sides, *Hobert* being strong against it in *Foster* and *Jackson's Case*; but it was settled by Act of Parliament *Jac. 1.*

Note, If one be delivered to the Sheriff in Execution by the King's Writ, he is presently in Execution, and in his Custody, without laying hands on him to Arrest him, and so is the Practice.

Note, A *Capias ad Satisfaciend'* may be executed the Day of the Return of it.

Capias ad Satisfaciend'.

At the Suit of the King.

If the King recover in *Scire facias* upon Recognizance for surety of the Peace on the breach of it, he shall have Execution by his Body at the Common Law. 7 H. 4. 34.

Where one shall be in Execution without a *Cap. ad Sat.*

Sometimes there shall be Execution of the Body without a *Capias ad Satisfaciend'*, as where the Defendant is taken by *Capias pro fine* for the King, or upon a *Capias Utlagatum* for the King after Judgment, in which Cases the Plaintiff may pray the Defendant in Execution for his Debt, or may refuse it. *Hob. 57.*

At the Suit of a Common Person.

In what Cases a Cap. ad Sat. lies or not, or in what Cases a Man shall be charged in Execution or not.

On a Judgment in *Scire fac'* on a Recognizance For Costs upon a Non-suit.

A *Capias* lies on a Judgment in *Scire facias* on a Recognizance acknowledged by the Bail of one in Execution in *B. R.* by the course of the Court. 1 *Roll. Ab. 897.* in *Cam' Seacc', James and James.*

Cap' ad Satisfaciend' lies for Costs awarded to the Defendant upon a Non-suit, and it is the usual practice. *Cro. Jac. 595. Dyer and Fincham's Case.*

S. be.

S. being in Execution for Debt due to the King adjudged against him in the *Exchequer*, was condemned in *B. R.* in Debt by Judgment, and brought to the Bar by *Habeas corpus* to be charged in Execution for this Debt also. *Per Cur'*, He ought not to be charged in Execution here, because he is in Execution at the King's Suit, for it is appointed by the Statute of 25 *Ed. 3. c. 10.* *Stat. 25 Ed. 3. c. 10.* That a common Person shall not have Execution against the King's Debtor unless he makes Agreement for the King's Debt, and then he shall have his Debtor in Execution, and detain him till he hath made satisfaction of the Debt due to himself, as also of the Debt which he paid for him to the King; but because he had not a Writ of Protection, *Per Cur'*, He is out of the Statute, and thereupon awarded he should be in Execution as well for the Party as the King. *Cro. Car. 389. Stevenson's Case.*

If a Man recover in a *Scire facias* upon a Recognizance acknowledged in *Chancery*, he may not have Execution by *Capias*, for the Statute of *W. 2.* gives *Capias* in Account, and 25 *Ed. 3.* in Action of Debt, but no *Capias* is given in a *Scire facias*, *Pasch. 11 Jac. Weaver and Clifford's Case.*

Part is levied by *Fieri facias* on Sale of a Lease or Goods, tho' a *Capias* lies for the residue not levied, yet the Party cannot be charged in Execution for it, not being so before, for Goods and Body cannot be liable both at the same time, but successive-ly.

ly they may, and by motion he was discharged. 2 *Keb.* 613. *Stokes's Case*.

If a *Capias* lies on a Judgment in a *Scire facias* upon a Recognizance acknowledged by the Bail of one *in Banco*, for that he only binds his Goods and Lands by the Recognizance, and this is in a Sum certain, *Rigault and Carrick*, 1 *Roll. Abr.* 897. and there an Action of Debt was brought upon the Judgment, because he could not have a *Capias*.

And in *Wildboare and Prestland's Case*, *Trin.* 18 *Car.* It is held no *Capias* lies on a Judgment in a *Scire facias* against the Bail upon a Recognizance acknowledged by the Bail in *B. R.* upon a Writ of Error brought in *Camera Scacc'*, the Recognizance being given there by force of the Statute of 3 *Fac.* 1. of Execution, because this Recognizance is not to be guided by the custom of *B. R.* but by the Common Law, and the Bail binds only his Goods and Lands, and not their Person, wherefore no *Capias* lies; and a *Supersedeas* was granted accordingly after a *Capias* granted and the Party taken by force of it.

In inferior Court. If the Bail in an Inferior Court acknowledge a Recognizance, that if the Principal do not pay the Damages and Costs recovered, or render himself to Prison *tunc concedit* the Damages and Costs *de terris & catallis suis levare ad opus querentis*, no *Capias* lies upon this Recognizance, for that he doth not bind his Person. *Hill.* 1 *Car.* 1. *B. R.* *Seaborn's Case*.

If the Plaintiff in Detinue recover Damages against the Garnishee, he shall not have Execution of his Body for this, because he is not a party to the Writ. *7 H. 6. 45. b.*

If a *Feme* recover Damages in a Writ of Dower, she shall not have Execution against the Body by *Ca. sa.* because no *Ca. pias* lies in the original Action. *No Ca. sa' where no Cap' in the Original.*

If one be Arrested upon a *Latitat*, and lie in Prison for want of Bail, and the Plaintiff hath Judgment and Execution against him in Prison, and a *Fieri facias* against his Goods, and levy a part of the Debt, he may by Prayer have his Body in Execution for the residue, but not otherwise: And if he doth not desire it, the Defendant may shew this to the Court and pray to be delivered; but where one hath any of the Land once in Execution by extent upon *Elegit*, he can never after this have Execution of the Body. *One is in Execution and on Fi. sa' levies part, he may pray him in Execution for the residue. If once the Party hath any of the Goods by Elegit, he can never after have his Body.*

Judgment is given in Debt upon several *Præcipe's*, the Plaintiff Arrests one on a *Capias ad Satisfaciend'*, and takes out a *Fieri fac'* against the other. *Per Cur'*, he cannot, but he may have a *Cap' ad Satisfaciend'* against them both. *Godb. 296. Rossers and Welsh. 4 Leon. 198.* If a Man hath one Judgment against seven Persons, he may take all their Bodies in Execution, because the Body is no Satisfaction. *5 Rep. Blumfield's Case.* *Judgment against two he cannot take a Ca. sa' against one, and Fi. sa' against the other.*

The Law of Executions.

Where part is levied by *Fieri facias* and returned, a *Cap' ad Satisfaciend'* shall issue for the residue only. *More* 598.

The Marshal shall be priviledged from being taken in Execution, because it would be an Escape of all the Prisoners. 1 *Syd.* 68.

In what Cases the Court cannot award Execution.

W. recovered against *B.* 60 *l.* Debt *B.* was brought to the Bar by *Habeas Corpus* procured by his Bail to save themselves, and so both the Plaintiff prayed that he might be committed in Execution, and also the Bail that he might be received in Execution in their discharge; but it appeared that *B.* had brought a Writ of Error allowed by the Chief Justice, and the return of it not yet come, so that the Court was disabled either to award Execution, or to commit him in Execution, and this was also the cause why the Bail could not be discharged: For the end of the Bail is not only to bring the Body, but that he become subject to the Court according to the meaning of the Bail, which cannot be in this Case because of the Writ of Error. *Note,* Afterwards *B.* was brought again by *Habeas Corpus*, and the Plaintiff prayed him in Execution because the Day of the return of the Writ of Error was past, and he had not caused the Writ of Error to be removed

moved, and so the Court was reenabled to award Execution. *Hob. 116. Wickstead and Bradshaw.*

Where Capias ad Satisfaciend' is well or ill issued, or well or ill served.

Capias ad Satisfaciend' to the Sheriff of *Middlesex*, who makes a Precept to the Bailiff of the Dutchy, and this was *2d' Cap' H. ad Respondend'*, where it should have been *ad Satisfaciend'*; the Bailiff returned the Precept served, and the Sheriff returned to the Court *Cepi corpus secundum exigentiam brevis*; though the Sheriff by his return had charged himself to the Plaintiff, so as he may demand Execution against him, yet in as much as *revera* the Defendant was never taken in Execution for the Debt, but only *ad respondend'*, there the Plaintiff is at Liberty to take out new Process against the Defendant, *per tot' Curiam*. *Yelv. 52. Wood and Harburne.*

Election to charge the Sheriff or Party upon ill Precept.

Note, Goods and Body cannot at the same time be liable upon Judgment to Execution, but successively they may. Therefore in *Stoke's Case* the Defendant being Prisoner, was discharged in regard part is levied by *Fieri facias* on Sale of Lease and Goods, &c. being after two Terms on common Bail; and said, although a *Capias* lies for the residue not levied, yet the Party cannot be charged in Execution for it, not being so before. *2 Keb. 613.*

The Law of Executions.

Breaking
open the
House to
Arrest.

A Bayliff caught one by the Hand (whom he had a Warrant to Arrest) as he held it out of a Window: *Per Cur'*, this is such a taking of him that the Bayliff might justifie the breaking open of the House to carry him away. *1 Vent. 306.*

Scire facias was brought the Year after Judgment in *B. C.* returned *Nihil & non est Inventus in Com' Hertford*, after which an *Alias Capias ad Satisfaciend'* is made out into another County; and this was assigned for Error in *B. R.* there being no Original *Capias* in the proper County. *Per Cur'*, by the Certificate of the Prothonotaries in *B. C.* there must be an Original *Capias* notwithstanding *Non est Inventus* and *Nihil* returned in the *Scire facias*, and Judgment was reversed, for he may be found after, tho' the Court at first was of another Opinion. *3 Keb. 613.*

Capias ad Satisfaciend' Return.

In what
Case the
Return is
not of ne-
cessity, and
why.

Diversity. Where the Execution ought to be returned, Error lies upon Error in the Execution; but where the Writ is not returnable of necessity, as if a *Cap' ad Satisfaciend'* comes to the Sheriff, and he doth apprehend the Party here, because here is a full Execution of the Judgment, this shall not be impeached by an ill Return of the Sheriff afterwards, as if he returns *Album breve*. *Sir Charles Hern versus Lord Camdiss.*

Vide

Vide Wood and Harburn's Case ante Tit' Of a Return Cap' ad Respondend' instead of Cap' ad Satisfaciend'.

If a Man be taken upon a *Cap' ad Sat'* the Execution is well done, tho' the Writ be never returned. *Aliter* in *Cap'* on mesne Process.

Superfedeas was prayed to a *Cap' ad Sat'* made on Thursday, being returnable *Veneris post Craft' pur'*, which is another distinct Return Day (*viz.*) *Octab' pur' Sed non alloc'*, Diversity between Judicial Writs and Originals, as to the Days of Return. for this being a Judicial Writ, tho' it be returnable at a Day certain, yet any description of that day is sufficient as here. But in *B. C.* the Days of Originals are settled by Act of Parliament, and there such Description should not be sufficient, if the *Veneris post* was a distinct return Day, and a *Superfedeas* was denied. 2 *Keb.* 883. *Lewen and Forth.*

Capias ad Satisfac' may be executed the Day of the return of it. So *Cap'* in Process. 2 *Rol. Abr.* 278.

Capias ad Satisfac'. Pleadings.

Eight Pound Debt for Costs adjudged to the Plaintiff (Defendant in the first Action) on a Non-suit there : The Defendant Pleas, that he was taken in Execution, and he was taken in Execution for the said 8*l.* *Et hoc, &c.* Plaintiff demurred, because if the *Ca' sa'* does lie in this Case, yet he doth not plead he is yet detained; *&c.* and it shall be intended he

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he escaped out of Execution. *Per Cur'*, the Plea is good: For when he was taken in Execution it shall not be intended that he escaped, and although he escaped he might be retaken in Execution, and is put to his *Audita Quer'*. *Cro. Jac. 595. Dyer & al' vers' Fincham.*

Execution
after the
Day of the
Return, but
before the
*Quarto die
post.*

In Trespass for Battery and Imprisonment, the Defendant justifies by Execution of a Writ, but upon the Plea it appears to be executed after the Day of the Return, but before the *Quarto die post*, and the Execution was adjudged to be illegal. 1 *Levins* 143. *Ellis and Jackson.*

C A P. VI.

Of Executions as to Goods and Chattels. Fieri Facias what. Who to Execute it. How, and in what Cases the Property of the Goods is altered by the Sheriffs Seisure or not. From what time the Goods shall be said to be bound. How, where two Executions are of the same Teste, Stat. 29 Car.2. c. 3. explained. Delivery of Fieri facias to the Sheriff after the Party is Dead. Of the Sheriffs levying the Money by Payment. By Sale of Goods. Of a Term. The time of Sale. Where the Sheriff may Sell, or not by reason of a Superfedeas. Of the Sheriff's Misdemeanor in Sale; by his not selling the Goods when he might, or selling them at Under-rates. Diversity between the Sale of a Term, and the Extent of a Term as to the Sheriffs selling it. Sale Covinous; Return of the Sheriff in Fieri facias, all in several proper Cases, and good Diversities.

IT is a Writ judicial, that lies at all times within the Year and Day for him that hath recovered Debt or Damages in the King's Court directed to the Sheriff, to levy the Debt or Damages upon his Goods and Chattels, against whom the Judgment or Recovery is had; but after the Year and Day, he cannot have this Writ, but a *Scire facias* first to warn the Party to shew Cause why Execution should not be made, who if he doth not come at the Day, or

What it is.
if

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if he come and shew no Cause, then he who recovers shall have a *Scire facias* directed to the Sheriff to make Execution of the Judgment.

Who to Execute it.

It is directed to the Sheriff, and he or his Bailiffs must execute it.

The *Scire facias* by *W. 2. c. 45.* is given, and tho' the Statute of *W. 2. c. 18.* couples the *Elegit* with the *Fieri facias*, and limits both to be executed by the Sheriff; yet the Serjeant at Mace may execute a *Fieri facias.* 4 *Rep.* 65. b.

How and in what Cases the property of the Goods is altered by the Sheriff's Seizure or not.

The Sheriff hath a special Property of the Goods on Seizure, and if any take them out of his custody before Sale of them, Trover lies, which is on the Right, as well as Trespass, which is on the Possession; as in the Case of a Carrier, who may recover against Strangers being answerable for the Goods. But in *Sare* and *Shelton's Case*, 2 *Rol. Abr.* 491. *Fieri facias* was brought against *B.* the Sheriff takes his Goods into his Hands, but before Sale of them *B.* delivers a *Supersedeas* to the Sheriff, upon a Writ of Error *B.* shall have the Goods again, for no Property in this case was altered

In what
Case pro-
perty is not
altered by
the Seizure.

tered by the Seifure. 1 *Sanders* 47. *Willbraham* and *Snow's* Case.

It is said in *Ayer* and *Ayden's* Case, *Relo.* 44. That by the Seifure of the Goods on a *Fieri facias*, the Property of the Owner is not altered, for that the Seifure is not any Execution but the beginning of it, but that is denied for Law. *Sid.* 438. 2 *Keb.* 589.

Note, The Plaintiff may File a *Fieri fa-* *Fieri fa-*
cias, part of the Debt being levied thereby *cias* filed
on Judgment, with intent to have *Audita* *Bars Ele-*
Querela on *Elegit* executed after it ; and so *git.*
it may be done had the Sheriff only taken
Bond, by assent of the Parties for payment
of the Money, and the taking such a Bond
was adjudged in a *Western* Cause at *Ex-*
eter, to be pleadable in Bar of a new Exe-
cution. 1 *Keb.* 551. *Ward* and *Hanchen's*
Case.

*From what time the Goods shall be said to
be Bound.*

Where two Executions are of the same Teste.

The Plaintiff and Defendant had both
taken out a *Fieri facias* against *L.* the same
Day, and *Nulla bona* returned, and *Fieri*
facias de bonis Ecclesiasticis, and Sequestra-
tion at Suit of both the same Day, but one
was delivered to the Bishops Register first,
which by the Opinion of *Wild*, Justice,
ought to be preferred first : But by *Twisden*
where two Executions are of the same
Teste,

Elegit as
to Goods
is but a
Fieri fac.

Teste, the Sheriff may prefer which he will. But by *Rainsford, C. J.* they must divide it, and the Money was brought into Court and divided equally, not according to proportion of Debts; tho one were an *Elegit* as to Lands and Goods, and the other of Money, yet *Elegit* as to Goods is but a *Fieri facias*. P. 28 Car.2. B. R. *Burdet* and *Illman's Case*.

Stat. 29

Car.2. c.3.

But now by the Statute of 29 Car. 2. c. 3. Any Judgment or Officer of any of the Courts at *Westminster* that shall Sign any Judgment, shall without Fee set down the Day of the Month and Year of their so doing upon the Paper or Record which he shall Sign, which shall be entered upon the Margin of the Roll of Record of the said Judgment, and such Judgment as against Purchasers *bond fide*, for valuable Consideration shall be Judgments from such Signing.

And by the same Statute it is Enacted, That the Day of the Month and Year of the Inrolment of Recognizances shall be set down in the Margent of the Roll, and no Recognizance shall bind Lands in the hands of the Purchasers *bond fide*, and for a valuable Consideration, but from the time of such Inrolment.

Now in 2 Vent. 218. a *Fieri facias* which was taken out, was executed after the Party was Dead upon the Goods in the Hands of the Executor, but the *Teste* was before his Death; but it appears, that the Delivery to the Sheriff and Endorsment thereupon

upon according to the said new *Stat. 29* ^{Delivery}
Car. 2. was after his Death. *Per Cur'*; At ^{of *Fieri*}
the Common Law the Execution is good. ^{*facias* to}
But that Statute is, That the Party shall be ^{the Sheriff}
bound but from the delivery of the Writ ^{after the}
to the Sheriff: The Court inclined that ^{Party is}
the Execution was good, and that the Sta- ^{Dead.}
tute was made for the benefit of Strangers, ^{*Stat. 29*}
who might have Title to the Goods be- ^{*Car. 2. c. 3*}
tween the *Teste* of the Writ of Execution, ^{explained.}
and the time of the Delivery of it to the
Sheriff; but as to the Party himself, the
Goods are bound from the *Teste* ever since
the Statute. <sup>Goods
bound
from the
Teste.</sup>

That by the awarding of Execution, the
Goods were bound before this Statute, ap-
pears in *Parkers* and *Moss's Case*, *Cro. El.*
181.

In *Trover* a Recovery was pleaded a-
gainst *J. P.* and a *Fieri facias* was award-
ed to the Sheriff, and after the Writ was
awarded and delivered to him *J. P.* died
possess of the Goods, and made the Plain-
tiff his Executor; and afterwards the De-
fendant by force of the Sheriff's Warrant
took these Goods in Execution as Bailiff to
the Sheriff, and delivered them to him. The
Plaintiff replied, That the Sheriff return-
ed the Writ *Tarde*; and a Demurrer upon
it. *Per Cur'*, The Execution was well ser-
ved, for by the Execution awarded the
Goods are bound; and the Sheriff need
not take notice of his Death. 2. The
false return of the Sheriff shall not make
the Bailiff punishable.

*Of the Sheriffs Levying of the Money.**By Payment. By Sale or Venditioni exponas.*

Payment
of the Ex-
ecution
Money to
the Party.

It was held by the Court, That if a *Fieri facias* go to the Sheriff to do Execution, and he levies the Money, and delivers the same to the Party; yet if it be not paid here in Court, the Party may have a new Execution, and it shall be no Plea to say that he hath paid the Money to the Party, for it is not of Record without the bringing of the Money into Court. *Godb. 147. vide Moor.*

Sheriff pays
it out of
his own
Money.

It was a Question in *Speak and Richard's Case*, If the Sheriff having a *Fieri facias*, or a *Ca. Sa.* pay the Plaintiff his Money of his own, whether he may now Levy this Money of the Defendant afterwards. *Hob 206.*

Debt.

Upon a *Fieri facias* on *paratos habeo* Debt lies, but not by the Sheriff's Return that he had delivered it to the Party, for if this be false, he ought to have an Action on the Case. *Palm. 124. 148.*

Case.

Payment
to the
Gaoler, no
discharge
of the
Sheriff.

Payment to the Gaoler upon Judgment; and Execution is not any discharge of payment to the Sheriff upon a *Fieri facias*. *2 Lev. 203.*

Whittington was in Execution by *Ca' sa'*, and being so in Execution, he assigned to the Under-Sheriff a Mortgage he had for a term of Years in certain Lands for Security of the Payment of the Execution Money

ney, and thereupon the said *Whittington* was let at large by the said Under-Sheriff, and afterwards the High-Sheriff was removed from his Office, and after that *Whittington* pays to the said Under-Sheriff the said Execution Money so secured as afore-
Whether the Sheriff can take a Mortgage of a term for Years for recovery of payment of Execution Money, and so let the Prisoner at large.

The Question was upon a Special Verdict, Whether this was an Escape in the High-Sheriff? and the Court held it was.

For the Sheriff had no Authority by the Writ of *Capias ad Satisfaciend'* to take this Mortgage, and so to discharge the Prisoner. But the Writ requires the contrary; for it is, *Qd' Capias le Plaintiff & eum salvo Custodias ita qd' Habeas corpus ejus coram Justic'* such a day *ad satisfaciend' le Plaintiff*. And without doubt if the Plaintiff in the Original Action had brought his Action against the Sheriff for an Escape before payment of the Money to the Under-Sheriff, that the taking of the Mortgage by him had not been pleadable in bar of this Action.

It was objected, That the payment of the Money to the Under-Sheriff was payment to the High-Sheriff.

Cur'. This cannot be, for this was done when both were out of their Office, and when there was not any relation or concern between them; and it is all one as if it had been paid to a meer Stranger; and if it had been received during the continuance in their Offices, yet for the Reasons aforesaid the Under-Sheriff had no

Authority to discharge the Prisoner. 1 *Lut.* 587. *Langdon and Wallis.*

Sheriff's re-
turn on
Levari.

Debt against the Sheriff. For that on *Levari* he levied the Sum, and at the Day returned that he had levied the same Sum 2000 *l. quos paratos habeo*, and yet did not deliver it in Court, *per quod*. The Sheriff pleads *quoad* 308 *l. nihil debet*. And Issue. And as to the rest he pleads, That after the Issuing the Writ and before the return,

After that
he paid the
Money to
the Plain-
tiff.

scilicet, such a Day, he did pay unto the Plaintiff the same Sum, whereupon the Plaintiff by his Acquittance the same Day reciting that he had received it, did acquit him of it. Plaintiff Demurs, 1. Because the Defendant's Plea to the 308 *l. nil debet* was naught, because it was directly contrary to his return of Record. But *per Cur'*,

If Defen-
dant will
not relie
upon the
Estoppel,
he shall
not take
advantage,
because he
takes Issue.

since they have not relied upon the Estoppel, but taken Issue, that will give him no Advantage. 2. Because since the Defendant by his return had charged himself with the whole Money, *paratos*, then to be delivered to the Plaintiff, he cannot now say it was paid and acquitted before: And before the return of the Writ he was not Debtor to the Plaintiff, and therefore a Release to him was void. *Sed per Cur' pro*

Money le-
vied and
paid by the
Sheriff to
the Plain-
tiff good,
and why.

Def. For as soon as the Money was received by the Sheriff, he was presently Debtor to the Plaintiff, and releaseable. And since by his Demurrer he hath confessed his Acquittance, the Court can never give Judgment for him upon pretence of this Estoppel.

But

But the Sheriff cannot deliver the Defendants Goods to the Plaintiff in Satisfaction of his Debt, but they ought to be sold, and the Appraisalment is not material.

Delivery of the Goods in Execution.

Debt on Judgment in *B. R.* the Defendant confesseth the Judgment, and that he was in Execution above a Year, and not being able to find the Defendant he paid the Money to the Marshal. It is not pretended that the Marshall had any express Directions to receive the Money, nor hath he any Authority by Law implied, and the Sheriff on a *Capias* could not receive the Money as he may on a *Scire facias*, which gives the Sheriff Authority to receive it. *Cro. Car.* 382. Nor is the Party remediless, for he may pay his Money into Court, *1 Leon.* 141. and have *Audita Querela*; but the Plaintiff were remediless should the Goaler be insolvent. He is committed *quousque satisfaciat parti*, not the Sheriff or Goaler; *Per Cur'*, Judgment *pro Quer'*, who can never prove Contract between the Goaler and Prisoner. *3 Keb.* 788. *Taylor and Baker.*

Sheriff may receive the Money on a *Sci' fac'*, not on a *Ca' sa'*.

Payment of Money into Court. *Aud' Quer'.*

By Sale, or Venditioni exponas,

Of Goods.

Of a Term.

Of Goods.

Venditioni exponas is a Judicial Writ directed to the Sheriff, commanding him to sell Goods, which he hath taken in Execution to satisfy a Judgment given in the King's Court.

The time of Sale.

If upon the *Fieri facias* the Sheriff returns, that he hath seized the Goods, but *non invenit emptores*, and after he is removed, and a new Sheriff made, the old Sheriff may not sell them after although a *Distingas* issue to the new Sheriff to cause the old Sheriff to sell them; and if he sell them upon this the Sale is not good, for the new Sheriff ought to sell them. 32 El. B. R. *Dodd and Conns.*

In *Cro. Jac.* 73. a Sheriff upon a *Fieri facias* seized Goods to the value of the Debt, and paid part of the Debt, and the Goods not being sold nor the Writ returned, the Sheriff was discharged of his Office, and afterwards sold the residue of the Goods without any Writ of *Venditioni exponas*. Per Cur^a

Where the new Sheriff ought to sell, and where the old Sheriff may.

Sale, without a *Venditioni exponas*.

Cur' resolved that the Sale is good ; for the Writ of *Fieri facias* gave him Authority to sell without any other Writ, and the Sale by him after is good, although he be discharged of his Office ; and by the Seizure, although the Writ is not returned, he is chargeable to the Party. *Cro. Jac. 73. Ayer and Aden.* Seizure,
Vid. Relu.
44. *Sanders* 247.
The Case

On *Fieri fac'*, *Sed non inveni emptores*, a *Distringas* to sell shall go to the old Sheriff, not to deliver the Goods to the new one, as was resolved in 2 *Cro. 73.* and the old one may sell without any new *Venditioni exponas.* 2 *Keb. 789, 821. Smith and Mildmay.* in Reluctation is not Law.

Where the Sheriff may sell or not by reason of a Superfedeas.

If upon a *Fieri facias* the Sheriff seize Goods, but before *Venditione* a *Superfedeas* comes to him, if the Sheriff after sell the Goods without a Writ of *Venditioni exponas*, the Sale is void. 8 *Car. 1. Scarling and King.* *Quere*, For if the Sheriff have taken Goods in Execution upon a *Fieri fac'*, and hath them in his hands not sold, and then comes a *Superfedeas* to the Sheriff, yet he shall not redeliver the Goods, but shall proceed in Execution to the Sale of the Goods, because the Commencement of the Execution is made before the *Superfedeas* delivered, and the Execution is entire and may not be divided. *More, fo. 542.* And so is the

Case of *Charter and Peter*, *Cro. Eliz.* 597. and *Sir Miles Corbet and Rookwood*; which is thus:

Record removed, and a *Superfedeas* awarded.

Fieri facias on Judgment in *B. R.* by force whereof the Sheriff took the Defendants Goods in Execution, and before the Sale the Record was removed by Writ of Error into the Exchequer Chamber, and a *Superfedeas* was awarded, and the Sheriff returned upon the *Fieri fac'* a Seifure of the Goods, and that they remained in his hands *pro defectu emptorum*; and he also returned that a *Superfedeas* was awarded, &c. and hereupon it was prayed for the Defendant that he might have Restitution of his Goods. *Per Cur'*, although this Record be removed, and the *Superfedeas* awarded, yet in regard it came not to the Sheriff till he had begun to make Execution, as appears by his Return, a *Venditioni exponas* shall be awarded to perfect it. And although the Plea Roll be removed, yet it shall be awarded upon the Return of the *Fieri fac'* which remains still in the Office.

And so is *Bromwood* and *Estwick's* Case, 1 *Keb.* 324. On *Fieri fac'* sued out, and then returned, that the Goods remain *pro defectu emptorum*, by Error or *Superfedeas* sued out, after that the Vendition is not hindered: But if the Error were allowed before, then though the Sheriff be unpunishable, yet *Superfedeas*, notwithstanding Execution done, shall go, *quia improvide*; and *per Cur'*, if the Goods be sold the Money may be brought into Court to be restored

to the Party, but if not Goods in Specie, may be restored.

Of the Sheriff's Misdemeanor in Sale ; his not selling the Goods when he might, or at an under Rate.

After the return of a *Venditioni exponas*, if the Goods remain *pro defectu emptorum*, The Goods and perish, without the default of the Sheriff, the Sheriff shall not be chargeable. perish for default of a Buyer. But in *Needham* and *Benner's* Case the Sheriffs of *Chester* had an opportunity of selling, If Sheriff and therefore having refused a Buyer, al- refuse to beit the Goods be not of the value, yet the sell. Sheriffs shall be charged by Action on the Case, and the Court refused to give the Sheriff leave to amend the Return, and adjourned to answer Interrogatories. *Syd. 483. vid. 2 Keb. 462.*

In *Sly* and *Finch's* Case : It was held by *Haughton*, if the Sheriff returns Goods to the value of 72 *l.* it is not any Estoppel to him, but that he may sell them for more or less as he can get for them. *Dodderidge contra.* If a *Fieri fac'* issue to the Sheriff, and he takes divers Beasts, and returns *qd' cepi Catalla ad valentiam* of 100 *l.* and after the Cattle die for want of Meat, in this Cattel pe- Case he shall have the value of the Goods rish for from the Sheriff himself. *Gra. Fac. 514, want of Meat. 515. Sed Quære de hoc.*

Fieri

Sale under
value.

The Sheriff of *Middlesex* on *Fieri facias* sold Bricks at 7 s. per Thousand on the place for which he might have had 16 s. per Thousand; the *Qu.* was, Who should pay the Overplus, for the Plaintiff and Defendant appointed a third Person to sell, the Defendant being Landlord, and having Debt due for the Ground, did it to save his Debt? The Sheriffs Executors shall pay it, and not the Defendant's Executors. 3 *Keb.* 285. *Sutton* and *Hunt*.

Misdemeanor.

In Debt the Defendant justified as a Marshal's Man for Execution of 6 l. the Plaintiff confesseth the Execution, but saith one piece of Silk taken was sufficient for the Debt, and that there were other things taken to the value of 50 l. and as to that *de injuria sua propria: Per Cur'*, the Plea is ill. But it's a great Misdemeanor if the Plaintiff tender the Debt, it's a wrong for the Sheriff to sell the Goods. *Lefans* against *Moregreen*.

Trespass against the Sheriff.

Where the Sheriff upon a Debt of 20 l. takes Goods which he sells for 40 l. and returns the Writ and 20 l. into Court, he may keep the Surplusage till the Defendant demand it of him. But if a *Fieri facias* be awarded for 40 l. by force whereof the Sheriff takes 6 Oxen, each of them worth 5 l. and sells them all, the Defendant may sue the Sheriff in Trespass for this. *Noy Rep.* 59.

On *Fieri fac'* against *J. S.* who has the Goods of *A.* a Stranger, on sale of these Goods Trover or Trespass will lie against the

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91

the Sheriff; and to prevent this all the Sheriffs of *England* take Security.

Sheriffs security.

If *A.* recover against *B.* Damages and Costs, and sues a *Fieri fac'* to the Sheriff, who by force of this takes the Goods of *B.* to the value, and so returns it, and that the Goods remain in his hands *pro defectu emptorum*; and after *A.* well knowing this, vexation to the intent to vex and double charge *B.* in levying sues out another *Fieri fac'*, and delivers it Money twice, tho' to the same Sheriff to be executed, who in a legal way, and upon this levies the Moneys of other Goods Case lies. of *B.* and pays it over to *A.* In this Case for this Wrong and Vexation, although it was in a Legal way, yet Action on the Case lies. *Hob. Waterer and Freeman's Case* cited. 1 *Rol. Abr.* 34.

As to Restitution of Goods upon a reversal of a Judgment by Error, and a reversal of Outlawry, *Vide postea Tit'* Restitution.

Sale of a Term.

If a *Fieri facias* comes to the Sheriff to levy the Money of the Goods and Chattels of the Defendant, and the Sheriff by Writing reciting that the Defendant had a Term for Years (and shews what) and supposing this commenced 2 & 3 *Phil.* and *Mary* (as it was in the Case at Bar) where in truth the Term commenced 3 & 4 *Pb.* and *Mary*, sells the same Term, the Sale is void, for there is not any such Term.

False recital of a Term which the Sheriff sells.

But

But notwithstanding this false recital, if the Sheriff sells also all the Interest which the Defendant had in the said Land (as he did in the Case at Bar) the Sale is good. and so was *Sidnam* and *Roll's* Case, the Sheriff reciting that *Rolls* had a Term of a Parsonage, *pro termino diversorum annorum tunc ventur'*, sold this by force of a *Fieri facias* to another, and the Sale was held good. But if he take upon him to recite a Term and mistake it, and sells the same Term, it is void.

Diversity
between
the Sale of
a Term,
and the Ex-
tent of a
Term, as
to the re-
cital.

So note, a Diversity between the Sale of a Term and the Extent of a Term, as where it was found by Inquisition, that a Debtor of the Queen was possessed of certain Lands, *pro termino quorundam Annorum ad tunc ventur'*, this Inquisition was insufficient, for a Term may not be extended without shewing the Commencement and Certainty of the Term; for that after the Debt satisfied, the Party is to have again his Term if any part of it remain, which ought to appear. 4 Rep. 74. *Palmer's Case*. And upon this the Party may have remedy to amove the Hands of the Queen or of any other Person. Cro. El. 584. *Palmer* and *Humfreys*, 4 Rep. 79.

Note, 2 Ventr. 93. it is said the Sheriff cannot sell the Term to the Plaintiff that took out the *Elegit*.

Sale of Goods, or of a Term Covinous, or not.

Sir *W. Fleetwood* posselt of an House, &c. was Receiver General for the King, and enters into 20 Bonds of 200 *l.* each, to make a Yearly perfect Account, &c. and so becomes indebted to the Queen; and afterwards Bargains and Sells the said Lease to *J. P.* who enters, the Sale shall bind the King being but a Chattel; and the Sale was *bond fide* and no Covin. And Sale *bond fide* after Judgment, is good of Chattels, but not after Execution awarded. 8 Rep. *Fleetwood's Case*, but as to this last, *vide supra Stat. 29 Car. 2. vide Twine's Case.*

If a Gift of Goods be fraudulent within the Statute of 13 *Eliz. c. 5.* the Sheriff may well take them in Execution by *Fieri Fac'*. The Case was, *Peirce* was indebted to *Twine* in 400 *l.* and to *C.* in 200 *l.* *C.* brought Debt against *Peirce*, and hanging the Writ, *Peirce* being posselt of Goods and Chattels 300 *l.* value, in Secret made a Deed of all his Goods and Chattels to *Twine* in satisfaction of his Debt, and yet *Peirce* continued in Possession of the same; and some of them he Sold, and his Sheep he marked with his own Mark; afterwards *C.* had Judgment and a *Fieri Fac'* to the Sheriff, and made Execution of the Goods, this Deed was adjudged to be fraudulent.

It

Marks of
Fraud.

It was Resolved.

1. That this Deed had the Marks of Fraud ; it was general and without Exception of Apparel, or any thing of Necessity.
2. The Donor continued in Possession.
3. It was made in Secret.
4. It was made pending the Writ.
5. There was a Trust between the Parties, for the Donor was in Possession and used them. And though it was a Debt due to *Twine*, and a good Consideration of the Deed, yet it was not *bona fide* as the Provision in the Statute mentions. 3 Rep. *Twine's Case*.

P. made a Deed of his Goods before *Fieri fac'* served, and shew'd the Deed dated the same Day of the Execution. *Per Cur'*, though the Gift were made *bona fide*, yet Execution may be taken of those Goods ; for by the suing forth the Execution all the Defendants Goods are liable : And the Jury found for the Plaintiff without enquiring of the Fraud. *Cro. El. 440. Bouchier and Wiseman.*

Fieri Facias.

Return of the Sheriff.

If a *Fieri Facias* goes forth to the Sheriff, and he Levies the Debt of the Goods of the Defendant, and doth not Return his Writ ; if the Plaintiff sueth another *Fieri Facias* against the Defendant, upon the Judgment he may plead this Matter, for the

the Sale by the Sheriff is good, and so it is a bar of the other Execution. *Godb. Case Pleading.* 171. *Fox and Bolton.*

That he hath levied part.

Judgment and Execution sued in *B. R. Wells* recovered against *D.* a Debt of 400 Marks, and had Execution by *Fieri Facias* upon it, the Sheriff returned that he had Levied 90 *l.* parcel of the Debt, and had the Money in Court, and that *D.* the Defendant had no more Goods *unde, &c.* *Wells* notwithstanding sued a *Cap' ad Satisfac'* of the whole 400 Marks, and an Exigent upon it. *D.* was Outlawed upon it; in this Case the Execution and Outlawry were Erroneous, for it ought to have made mention of the 90 *l.* which was Levied before the Outlawry and Execution were reversed, but the Judgment was affirmed. *Cro. El.* 344. *Dennis and Wells, Moor Case* 819. because of the return of the 90 *l.* of Record on the *Scire Facias.*

Execution reversed,
Judgment affirmed.

In what Case the Sheriff having seised Goods may Return Nulla bona.

Bryan Baily of the *Savoy* came in by Attachment, having levied Goods, and yet returned *Nulla bona*, for Cause whereof he saith, That one *Verney* at the time of the Execution shewed a Bill of Sale upon good Consideration, whereby he was liable to an Action, therefore without Security to
save

save himself harmless, he refused to make any other Return than what the Court ordered; and the Court ordered the Money to be brought into Court, and as the Tryal goes between the Sheriff and *Verney*, the Return to be amended or not. 1 *Keb.* 901. The King against *Bryan* Bailly of the *Savoy*.

Rescous returned.

The Sheriff chargeable by *Scire Fac.*

On a *Fieri Facias* the Sheriff Returns, he has taken Goods into his Hands of 72 *l.* value, and had Sold as many of them as came to 11 *l.* *quos hic habeo paratos*, and that the residue did remain in his Hands, *pro defectu emptorum* until such a Day, at which time he putting them to Sale they were Rescued from him; upon which Return a *Scire Facias* was brought against the Sheriff, *quare Executionem habere non debet* comprehending all this Matter. *Per Cur.* The Return is not good as to the Rescue, and the Sheriff by this Return hath charged himself. The Question was whether he hath charged himself by this Writ. By *Dodderidge* he is chargeable by the *Scire Facias*, and he has charged himself by this *Scire Facias*, as well in regard of his Misdemeanor as of his Remedy over: And he held, That if he had returned only *quod remanent in manibus pro defectu emptorum*, he should not have charged himself, for therein he had done his Office; and in such

such Case a *Distringas* shall issue to Sell the Goods, and deliver the Money to the new Sheriff, according to 34 H. 6.

Obj. Perhaps he had seised the Goods again, so as now he may Sell them and make Execution upon a *Venditioni exponas*.

Resp. Then he ought to have pleaded this to the *Scire Facias*. *Cro. Fac.* 514, 515. *Sly* and *Finch*. But the Court being divided, *Adjorn*?. This Case of *Sly* and *Finch* is in 2 *Rob. Rep.* 57. Where it was agreed If the Sheriff take the Goods to the value of the Debt, the Defendant is discharged, altho' the Sheriff doth not satisfy the Plaintiff, and the Plaintiff cannot Sue out a new Execution against him. And it was agreed, That the Return of the Rescue was no Excuse; he might have had a *Posse Comitatus*; and that the *Scire Facias* lies against the Sheriff for the Money received in respect of his Demeanor, also for that he hath remedy against the Rescuers; but a *Venditioni exponas* shall not issue, because it appears he hath not the Goods.

The like Case is in *Godb.* 276. *More* 468. Error in a *Scire Fac*' against the Defendant late Sheriff of S. he pleads there was a Judgment, and *Fieri Fac*' directed to him, and that the Goods were Rescued from him, and so *Fieri facere non potui*. The Plaintiff Demurred, Its an ill Plea, and the *Scire Fac*' well lies without any *Venditioni*

H

exponas

Where the
Sheriff
may be
charged by
Seifure or
not.

exponas ; as *Cr. Car. 539. Perkinson's Case*
On a *Fieri Fac'* which imports a Seifure, and
a levying of the Debt the Sheriff may be
charged, but where there is no *Scire Fac'* re-
turned it doth not charge the Sheriff with-
out a *Venditioni exponas*, no more than a
Cepi bona & remanent pro defectu emptorum ;
but here no *Venditioni exponas* can be, be-
cause the Sheriff hath not the Goods in his
Hands ; but he is the cause of it himself,
and the Return of Rescue is ill, as *Sly* and
Finch's Case is, he hath made the Debt his
own ; on the Seifure by the old Sheriff the
Sale may be after, and by his neglect by
suffering a Rescue the Party is without
Remedy.

New Exe-
cution for
the over-
plus of
value of
the Goods
rescued.

It was agreed in *Mildmay* and *Smith's Case*,
where the Sheriff upon a *Fieri Fac'* Returns,
that he had seised Goods of less value than
the Debt, which were rescued, and that
Nulla alia bona, &c. The Plaintiff shall not
Sue a new Execution, but only for the sur-
plus over the value of the Goods rescued.
2 Sand. 344.

Return in reference to Executors.

Levied of
Goods of
the Testa-
tor in the
Hands of
the Exe-
cutor.

The Sheriff Returns he hath levied 80 *l.*
parcel of the Debt and Damages of the
Goods of the Testator in the Hands of the
Executor. Exception was, That it was ill in
regard the Sheriff can Levy nothing of the
Executors Estate, till the whole be Levied
of the Testators ; the Debt first, and then
the

the Damages of the Executors Estate : But its said [only he returned it in *partem solutionis debiti*; which *per Cur'* is well, and the Damages are not levied of the Executors own Estate. Judgment *pro Quer'*. 2 *Keb.* 331. Norton against the Executors of Sir Job Harvey.

The Sheriff upon a *Fieri Fac'* returned, that none came to shew him the Goods, it [is not good unless it appear where the Goods were. 1 *Keb.* 158. Return that none came to shew him the Goods.

Fieri Fac' to the Sheriff of Lands, he Returns *quod nulla bona*, and that he is *Clericus beneficiat'* in *Ely*, upon which a Writ issues to the Bishop of *Ely*, and he Returns *quod nulla habet bona Ecclesiastic'* and the Return was allowed, tho' it was suggested that he had a spiritual Living in verity. *Per Cur'*, If it be so, the Plaintiff may have an Action on the Case for the false Return against the Bishop. *Sid.* 276. Pickard and Payton's Case. Return quod est clericus beneficiatus.

Sheriff's Demeanor.

In Breaking open Houses to do Execution.

Against a Person.	{	At the King's Suit.
Against House and Land		At the Suit of a Common Person, and in giving Possession.

In a Bill of Trespas the Defendant justifies as Bailiff, by virtue of a *Fieri facias*
H 2 directed

Of the Sher-
riffs en-
tring into
a Barn.

directed to the Sheriff, who *per vias usua-*
les entred the Barn of the Plaintiff, where
the Goods of *Welfead* were, against whom
Williams had recovered. The Plaintiff Re-
plies, The Doors were shut, *absque hoc*
that there was request. The Defendant
Demurs Specially: The Point was, whe-
ther without request the Sheriff may break
open a Barn (on *Semain's Case*) which
doth not appear to be a parcel of a dwel-
ling House. *Per Cur'*, Its not material in
case of a Barn, whether the Doors be o-
pen or shut, and so the Traverse taken by
the Plaintiff is immaterial, as in case of a
Close, there being no particular place
where the Sheriff may make demand; and
so the Defendant had Judgment: But *con-*
tra, if the Barn had appeared to be par-
cel of the Mansion-House; also this Tra-
verse is void being Matter in Law, and al-
so double. 1 *Keb.* 698. *Penton and Brown.*
The Barn not being parcel of, or adjoin-
ing to the House may be broken open by
the Sheriff to execute a *Fieri facias*, tho'
the Door be not open. *Sid.* 186. the same
Case.

The Sher-
riff may
break open
an House
to deliver
Possession.

When an House is recovered by any
real Action, or by *Ejection' Firme*, the Sher-
riff may break open the House and deliver
Seisin or Possession, &c. as in a
Quo minus, &c

In all cases where the King is a Party,
the Sheriff if no Door be open may break
the House of the Party, either to take him
or to do any other execution of the King's
Process,

Process, but before he break it he ought to signifie the cause of his coming, and to make request to open the Door. Door shut.

In all Cases when the Door is open, the Sheriff may Enter into the House and make Execution at the Suit of a Subject, either of his Body or of his Goods. *Cro. Jac. 556.* Door open.

But it is not lawful for the Sheriff (upon request and denial) at the Suit of a Common Person, to break open the House of the Defendant, *viz.* to execute any Process at the Suit of another Subject, *aliter* in case of Felony. At the Suit of a Common Person.

The Sheriff may not break open the House of the Defendant by force of a *Fi-eri Facias*, but he is a Trespasser for the breaking; yet the Execution when it is done in the House is good. By *Fi-eri Facias*. Sheriff a Trespasser, yet Execution

Per W. 1. c. 17. The Sheriff may break open an House to do Execution against one that flies there, or on the Goods of another that are there for Protection, for the Privilege of the House extends only to him and his Family, and to his Goods, or to those which are there lawfully, and without Fraud and Covin; and therefore in such a Case the Sheriff may after denial and request, break open the House. when done is good.
5 Rep. Semaines's

The Law of Executions.

Delivery
of Posses-
sion rioto-
usly.

Remedy.

The Under-Sheriff delivered Possession on an *Extend' Fac'* on a *Stat. Merchant* Riotously, and the Justices refused to appear to inquire of the Force, and the Sheriff to Return any Jury. *Per Cur'*, Unless a Cause be depending, they cannot take notice of Offence without Information; the proper remedy as *Moor* 781. *Pl.* 1083. is in *Chancery* or *Common Bench*, on *Elegit* returned there. 2 *Keb.* 541. *Morgalrod* against *Peeples*, Attorney in *B.C.*

C A P. VII.

Of Habere Fac' Possessionem. How Possession to be delivered. Where the Party may Enter without the Sheriffs delivery. Of the Posse Comitatus. Of the excuse of the Sheriff. What Execution shall, or may Issue after a Capias ad Satisfaciend' the great Question. If one die in Execution, whether Execution shall be after against his Lands. And how settled. What Execution may Issue after an Elegit, or not. In what Cases Execution may be after Execution. And what sort of Execution after Escape. After Death. After Fieri Fac'. After Elegit, (Vid. puis.)

How to be delivered

WHen but part of the thing in Demand is recovered the Sheriff must set it forth ; but when all is recovered, the Sheriff may give Possession of one Acre in the name of the whole. *Palm.* 289.

After Verdict, Trial and Judgment in Ejectment, and a Writ of *Habere Fac' Possessionem* to the Sheriff directed, a Writ of Error was brought *B. R.* and a *Supersedeas* granted directed to the Sheriff to stay Execution, which Writ of Error and *Supersedeas* was shewed to the Sheriff as he was going to do Execution. He did Execution, This is a Contempt, and a Writ of Restitution was granted.

Where a new Habere Fac' Possession'.

Note, Pro Regula That after *Habere Fac' Possession'* executed, be it by the Sheriff or voluntary delivery of Possession, if the Party be turned out again by the Defendants means, he may have a new *Habere Fac' Possession'* upon motion in Court, and Attachment against him. 1 *Keb.* 779. 785. *Ratliff* and *Tate*.

But if others Enter after quiet Possession, he must have a new Action or Restitution.

If the Sheriff give Seisin but of part, he may have a new *Habere Fac'* for the rest.

Upon the *Habere Fac' Possession'* the Sheriff returned, that he took the Plaintiff with him, and came to the House recovered, and removed thereout a Woman and two Children, which were all the Persons upon diligent Search he could find in the House, and so delivered to the Plaintiff Possession, and departed, and immediately after three Persons secretly lodged expelled the Plaintiff again; upon Notice whereof he returned again, but was resisted, so that without Peril of his Life he could not do it; upon this Return the Court awarded a new Writ of Execution, and an Attachment against the Parties. 1 *Leon.* 145. *Upton* and *Well's* Case.

A Writ of Error is brought of a Judgment in Ejectment, and is determined by the Death of the Defendant, a new *Habere Fac' Possession'* may be sued out without any *Scire Fac'*. For *per Cur'*, The Possession is only suspended by the Writ of Error, and the Writ of Error being abated, an *Habere Fac' Possession'* may be taken out before, or after the Year without a *Scire Facias* whoever be in Possession, or by what Title soever. 2 *Keb.* 30. *Siderf.* 351. *Vicars* and *Obrie's Case*.

Note, The Party hath Election to Return the *Habere Fac' Possession'* or not, and may renew it at Pleasure, till an effectual Execution be had.

Lands are extended by virtue of a Statute and Seised into the Queens Hands, and afterwards a Writ of *Liberate* is awarded, the Party may presently thereby Enter without the Sheriffs delivery of Possession. *Cr. El.* 479. *Al.* 463. *Butler* and *Wallis's Case*.

If a Man recover in an *Affise* divers Houses, and after the Tenant reverse it in a Writ of Error, and a Writ of Execution issues to the Sheriff to put him in Possession of the Houses which he had lost by the Judgment; although the Ter-tenants are strangers to the Recovery, and therefore may not be ousted without *Scire fac'* against them, yet if he make Execution, putting them out of Possession by force of this Writ, he is not any Disseisor, because he had direct Authority from the Court to do it. 1 *Roll. Abr.* 663. *Lloyd* and *Bethell*.

Where the Sheriff in putting the Party in Possession shall be said to be a Disseisor, or not.

The

The Law of Executions.

The same Law in all Cases where the Execution is of a Judgment, in which the demand was of a Thing certain, if the Sheriff make Execution of this Thing it is not a Disseisin; but where Execution is in the generality without mentioning any Thing in particular, there the Sheriff ought to do Execution of the right Thing at his Peril, otherwise he shall be a Disseisor; for he is bound to take notice of it, and he had not any Warrant from the Court to make Execution but of the right Thing.

The *Habere fac' possessionem* doth always recite the Term of the Judgment, and therefore in Action of Covenant to save harmless and quiet, &c. from Suits and lawful Evictions, Defendant pleads performance. Plaintiff replies, J. S. took out a Writ of *Habere fac' possessionem* out of B. R. debito modo executed, and by vertue thereof entred on the Possession of the Plaintiff, and did expel him. Defendant demurred, and well; he ought to shew the Particulars as reciting the Judgment, and *debito modo* is not sufficient without it. 1 Keb. 379. Nicholas and Pullen.

Habere fac' Seisinam.

Upon recovery of Dower of three Mannours, the Sheriff cannot give her Seisin of one Mannour, but he must give her Seisin of the third of every Mannour. But if the Recovery be of all Lands, viz. Meadow,

dow, Pasture, &c. the Sheriff may assign her her Dower in the Meadow only. *Moor Rep.*

Excuse of the Sheriff.

Upon an *Habere fac' seisinam* it's a good Return to excuse the Sheriff, that he was always ready to deliver Seisin, and appointed divers times in certain for the Party to come to the Land to receive Seisin, at which times he was ready to deliver Seisin, but none came from the Party to receive it. *2 Rol. Abr. Lloyd and Bethell.*

But if the Sheriff return he was ready at the Place where, &c. such a Day to have delivered Seisin, and gave notice to the Party that he should be there at the Day to accept it, and none comes for him at the Day. This Return is not good, without excusing himself from the time after the Day, for he might have done this after the Day before the Return. *Id. ibid.* And so he ought to excuse himself from the time before the Day aforesaid, otherwise the Return is not good, for peradventure he was requested before and would not perform it. But two Judges against it; for the Sheriff cannot attend at all times.

Posse Comitatus.

A Sheriff who cannot do Execution by a *Posse Comitatus* ought to acquaint the Deputy-Lieutenants of the County; and if they assist not, he must acquaint the King and Council: and yet the Sheriff shall be amerced if he return he cannot do Execution. But in *Bush and Chamberlain's Case* upon a resistance of Execution the Council Table refused to meddle, because this Court (*B. R.*) ought to see their own Judgments executed. And *Finch* pray'd a Writ to the High-Sheriff, but with a special Rule that the High-Sheriff should execute it himself, which the Court granted, and a Tipstaff to fetch the Under-Sheriff up to return his Writ, which is better than an Attachment, which is returnable by it self. 1 *Keb.* 99, 117.

What Execution shall or may Issue after a Ca' sa'.

One in Execution by *Capias ad Satisfaciend'* and dies, the Plaintiff may have a new Execution by *Elegit* or a new Execution after his Death by *Elegit* or *Fieri fa'*. If the Defendant be in Execution by a *Capias ad Satisfaciend'* and dies, the Plaintiff may have a new Execution by *Elegit* or *Fieri fac'*, for the reason given in *Blomfeild's Case*. 5 *Rep.* 87. Though the Lord *Hobart* is of another Opinion in *Foster and Jackson's Case*, and gave some nice Reasons, and cites *Lamb's Case*. *Scire fac'* against the

the Administratrix of *Lamb* to have Execution of 88*l.* Debt and Damages recovered against *Lamb*. Defendant pleaded that the Plaintiff by *Cap' ad Satisfaciend'* had taken *Lamb* himself in Execution, in which Execution he died, and demanded Judgment, and the Plaintiff demurred. *Hill. 4. Jac.* It was adjudged against the Plaintiff in *B. R.* which was long after *Blomfeild's Case*, which was argued 38 & 39 *El.* in which case of *Lamb*, called *Williams and Cutler's Case*, *Popham, Williams and Tanfield* held the Plea was good. For when Execution is awarded against one personally, and he is taken by a *Cap' ad Sat'*, and returned it as an absolute and perfect Execution against him: And though the Law saith it is not any Satisfaction in it self, yet it is so high that there cannot be any other Execution, and when he dies the Execution is determined as to him, and there cannot be any other Execution as to his Lands or Goods. So *Cro. Jac. 143. Williams and Cutler's Case.*

But it was on all hands agreed, where Two are two are Condemned, and one is taken in Execution and dies, yet Execution may be against the other. *Relverton* doubted of the first, because the Body is but as a Pledge. *Vide* this Point settled by Act of Parliament in 21 *Jac. 1. c. 24. Cro. Car. 240. Vide* 255.

Two are Condemned, and one dies in Execution, Execution shall be taken out against the other.

By the Statute of 21 *Jac. c. 24.* it is provided, ' That the Party or Parties at whose Suit any Person shall stand charged in Execution for Debt or Damages recovered,

One in Execution by *Ca' Sa'* dies, a new Execution against his Lands. 'vered, their Executors or Administrators may after the Death of the Person so charged, and dying in Execution, lawfully Sue forth a new Execution against the Lands Tenements, Goods and Chattels of the Person so deceased, in like manner as if he had never been taken in Execution; *vide infra*, This Act was made to Settle the diversity of Opinion in *Foster* and *Jackson's* Case, and *Blomfield's* Case.

If one in Execution be bailed, he may be taken again upon a new Execution; *aliter* if he Escape. 1 *Rol. Rep.* 190. See the late Act.

Execution after Elegit, Capias after Elegit.

After *Elegit* entred of Record, he may not after resort to any other Writ of Execution, because he has made his Election. *Trin.* 15 *Jac.* B. R. *Andrews* and *Cope's* Case.

If a Man recover in B. Debt or Damages, and prays an *Elegit* which is entred of Record, and after the Record is removed in B. R. by Writ of Error, where the Judgment is affirmed within the Year; the Plaintiff may have Execution in B. R. by *Capias*, or *Fieri Fac'*, for that this is another Court, than that where he had made his Election before. *Vide ibid.* and after such Judgment affirmed within the Year; it is affirmed to the Court, That the Sheriff had returned his Writ served; yet the Plaintiff may

may have a *Capias*, for that this Allegation does not appear to the Court, and now it is impossible it can be returned in *B. R.* and so it is stronger if a *Nil* had been returned. *Ibid. vide Cro. El.* 160.

If a Man Sue an *Elegit* and this is returned *Nil* within the Year, he shall have a *Capias*, or a *Fieri Facias* within the Year. *Andrews* and *Cope*. And this is the common Course to have it within the Year after the Prayer.

If a Man Sue an *Elegit*, and upon this certain Goods are taken in Execution, and Sold for part of the Debt, and this is returned; yet he may have a *Capias* afterwards, for now it is in effect but a *Fieri Facias*, no Land being extended, so this is but a *Nil* for the Land. *Hob. p.*

If a Man Sue an *Elegit* upon a Recovery, and the Sheriff Return, that he had made Pertition of the Lands of the Defendant by the 12 Jurors; but he cannot deliver the Moiety to the Party according to the Writ, for that all the Lands extended to another upon a Statute, he may after have *Cap' ad Satisfaciend'*, for this Return is all one with a *Nil* returned, for *non constat* by the Return when the Plaintiff shall have Execution, nor may the Plaintiff have any benefit by this Writ of *Elegit*, for after the Extent ended he ought to have a new *Elegit* and not a *Levar' Fac'*. *M. 31, 32 El. B. R. Palmer and Knowles. 1 Leon. 176.*

If

New *Elegit*.

If a void *Elegit* be filed; yet after the Year he may have a new *Elegit*. *M. 10 Jac. B. R.*

Elegit Return.

21 *H. 7. 19.* A Man shall have *Capias* after a *Fieri Facias* or *Elegit*. 34 *H. 6. 20.* The special Return in *Palmer's Case*, doth

New *Elegit*.

amount to as much as if the Sheriff had returned *Nihil*; and here is no Execution returned, for after the former extended he ought to have a new *Elegit*. 1 *Leon. 176.*

Party takes out *Elegit* and can have no Fruit of it.

Hob. is positive (tho' the Books have much varied) that where the Parties takes out an *Elegit*, and can have no Fruit of it, he may resort to another Execution tho' the *Elegit* be entred of Record. 17 *Ed. 4. 4. Per tot. Cur'*, after *Elegit* taken forth, and the year expired before it was served, whereupon a *Scire Fac'* was sued out, and upon that a *Cap'* by Judgment; for the Election that is made and recorded, is not to be taken as an Election of the very Writ of *Elegit*, but Election of the Land, *Elegit Executionem de medietate terrarum, &c.* *Hob. 57.*

Elegit what Election by it.

If *A.* recover against *B.* in Action of Debt, and *B.* is taken by *Ca' Sa'*, and afterwards the Sheriff suffers him to Escape; in this Case *B.* is fully discharged, and *A.* shall have no new Execution against him, for he had a full Execution, *aliter* in case of Execution on a *Stat. Merchant.* 2 *Leon. Case 117.*

Per

The Law of Executions.

113

Per Glin. Styles 454. After *Elegit* executed and filed, no other Execution lies. *Stroud* and *Beckweith. Vide Shp. 414.*

The Plaintiff after an *Elegit* upon a Judgment in Debt may have a *Capias*. 2 *Inst* 394, 395.

Resolved in *Cowley and Lideor's Case*, 11. *Jac. B. R. 2 Bulst. 27. Godb. 355.* That a *Capias* doth not lie after Execution by *Elegit*; but after a *Capias* an *Elegit* is grantable. Reason of the Difference, because upon the Prayer to have an *Elegit* it is entred upon the Roll, *Elegit sibi Executionem per medietatem Terræ*; but if the Sheriff return upon the *Elegit* that the Party hath no Lands, then the Plaintiff may take forth a *Capias*. An *Elegit* in it self is Satisfaction.

Executions which have their Effect in part:

If upon a *Fieri Facias* the Defendant be satisfied in part, the rest may be served either by *Capias* or *Elegit*. Where Execution may be had for part by *Fieri Fac*, and for other by *Capias* or *Elegit*.

Upon the *Elegit*, if there be no Execution but upon Goods, because there is no Land, and the Goods are not enough, *Hobart* is of Opinion he may have a *Capias*, for now it is but in effect a *Fieri fac*, tho' the word be *Elegit*.

But if there be Land extended it is otherwise, but a *Capias* goes to the whole Debt. *Hob. 58, 59.*

Debt on Judgment of 2000 *l.* the Plaintiff being satisfied, 500 *l.* by Execution executed

cuted brought this Action for the residue. Defendant pleads that before this time, &c. the Plaintiff came into Court and prayed several *Elegits* to several Sheriffs, and one of the Sheriffs returned, that the Defendant had only a Term for Years, which he extended to so much (but it appears it was now determin'd, and had satisfied the 500 l.) upon this Plea the Plaintiff Demurrs; and Judgment *pro Quer'*. Debt well lies in this Case: It is Executed as a *Fi' fac'*, forasmuch as nothing but a Chattel is found. Qu. If he may have a new Execution upon

Several *Elegits* pleaded, and but one returned.

the first Judgment? It was objected, here is but one *Elegit* returned, and perhaps upon the other the Sheriffs have levied the Debt; but the Defendant ought then to have pleaded it. 1 *Syd.* 184. *Glascock and Morgan.*

Vide a good Argument of this in 2 *Bulst.* 297, 298, 110, 111. *Godb.* 355. *Cowley and Lydcot's Case.*

In Execution on Statute Merchant, if the Sheriff let him at Liberty, yet Execution shall go against the Lands of the Conusor.

If the Body of the Conusor in a Statute is taken in Execution, and the Sheriff sets him at Liberty, the Conusee may notwithstanding have Execution of the Lands of the Conusor. 2 *Leon.* 96. *Linacre and Rhodes.* For in case of Execution on a Statute Merchant the Execution by the Body is not the full Execution, and therefore the Sheriff dischargeth the Body, yet the Conusee may have Execution of the Goods and Lands, but not of the Body.

Trover for Plate: Defendant pleads that at another time the Plaintiff had brought his Action for this same Plate against J. S. supposing

supposing the Conversion to be made by him, and in that Action had Judgment to recover 20 l. for Damages, and had 7. S. in Execution for those Damages, and avers it is for the same Goods and the same Trover: *Per Cur'*, the Plea is good, for the Cause of Action being against divers, for which Damages uncertain are recoverable, and he having Judgment against the one for Damages certain; that which was uncertain before is reduced *in rem judicatam* and to a certainty, which takes away the Action against the others. The difference between this Case and the Case of Debt upon Obligation against two, is, because there every one is chargeable and liable to the entire Debt, and therefore recovery in that Case against one is no Bar against the other until Satisfaction. *Cro. El. 71. Brown and Wotton.*

In what Cases Execution may be after Execution or not, and what sort of Execution after Escape.

If a Man in Execution escape, and the Sheriff makes fresh Suit after him, and takes him again, although it be a long time afterwards, yet he shall be said in Execution again, for that he shall not take advantage of his own Wrong. *3 Rep. 52. Ridgway's Case.*

So if a Man upon a *Capias ad Satisfaciend'* be taken in Execution, and after a rescues himself from the Sheriff and Escapes, the

New Cap'
after a Res-
cous.

Plaintiff may have a new *Capias* against him, and take him again, the first Writ not being returned. *Pasch. 8 El. Sir Robert Mounson and Clayton*, adjudged *per Cur'* upon a *Scir' fac'* after the Year, because he shall not take Advantage of his own wrong. So *Pasch. 1 Jac. B. Radford and Hopkins*. So in the said Case, if the Sheriff had returned the Writ and the Rescous, the Plaintiff might have a new *Capias* against him for the cause aforesaid.

Action a-
gainst the
Sheriff, or
retaken in
Execution
on volun-
tary Escape

If *A.* be in Execution at the Suit of *B.* and Escape with the assent of the Sheriff, and after the Sheriff retakes him and keeps him in Prison, he shall be in Execution to *B.* because although *B.* may bring an Action against the Sheriff for this voluntary Escape, yet this is at his Election, for the Party in Execution by his own *Tort* shall not put *B.* to his Action against the Sheriff against his Will, and it may be that the Sheriff is not able to give him Recompence. *Mich. 10 Car. 1. B. Trevillian and the Lord Roberts.*

One in Ex-
ecution in
one County
Escapes in-
to another,
where he is
taken in
Execution.

A Man in Execution in the County of *Devon*, and Escapes into the County of *Somerset* where he is taken in Execution, and after the Sheriff of *Devon* upon fresh Suit finds him in Prison in *Somerset*. 2. Whether he may charge the Sheriff with the first Execution, and put the Party in Execution, in as much as he cannot retake him.

If

The Law of Executions.

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If a Man be Condemned for a Fine to the King and Damage to the Party, in an Action where a *Capias* lies in the Original, and he is taken by *Capias pro Fine* at the Suit of the King, and after suffered to Escape, yet the Party at whose Suit the Recovery was, may have Execution by *Fieri fac'* or *Elegit*, although he may if he will make this an Escape to him, and so sue the Sheriff, for he was in Execution to him at his Election. 18 H. 6. 19.

If *A.* be taken in Execution upon a *Cap' Elegit* or *ad Satisfaciend'* at the Suit of *B.* and Escape *Fi' fa'* after from the Sheriff, and no return is made of *Ca' fa'* and the Writ, nor is it filed, nor any Record made of the Award of the *Capias*, *B.* may have a *Scire fac'* against *A.* upon the Judgment, and so after have *Elegit* or any other Writ. Sir Robert Mounson and Clayton's Case. So if in such Case all is pleaded and confessed upon Demurrer; but it is not pleaded that the *Capias* was filed or returned, *B.* may have a new *Scire facias* against *A.* to have Execution, and so after have *Elegit* or any other Writ. *Id. ibid.*

After Death.

A Recognisance is acknowledged to two, *Sci' fa'* on upon this a *Scire fac'* Issues out, and Judg- a Recogni- ment thereupon: An *Elegit* goes out in *sance to 2,* both their Names, and so by several Con- Judgment and *Elegit* tinuances till one of the Conusees dies; in both the Qu. was in Law, *Toothill* and *Rawlin's* Names.

I 3

Case,

Case, Whether an *alias Elegit* ought to be taken out for the surviving Conusee alone, or a new *Scire facias*? *Per Cur'*, Execution by the surviving Conusee, notwithstanding the Death of the other is good enough, and an *alias Elegit* may be taken out without a *Scire fac'*.

Two Plaintiffs and one dies after Judgment, before Execution, survivor may take out Execution without a new *Scire fac'*.

Judicial Writs abate not by the Death of one of the Plaintiffs.

Diversity between Execution as to a Recognisance, and a Stat Merchant or Staple. Change of the Party to the Record.

For where there are two Plaintiff's and one dies after Judgment and before Execution, the other may take out Execution without a new *Scire facias*: The Opinions have been different; both are alive at the time of the Execution sued out, there are continuances, it is suggested and entred upon the Roll, that one of the Parties is dead. I think this is a stronger Case, it is but the continuance of the same Process; if he die after the Writ taken out and before Execution, the Execution is good upon the same Writ; and the ground of all this is *Read and Redman's Case*. 42 Ed. 3. fo. 8. Regularly Judicial Writs shall not abate by the Death of one of the Plaintiffs. *Carter's Rep.* 193, 194.

As to 2 *Inst.* 171. on Stat. *W.* 2. c. 45. It is true, one that is not Party to the Record, Recognisance, &c. tho' they be privy shall have no Writ of Execution tho' it be within the Year without a *Scire fa'*, *aliter* in Case of a Statute Staple or Merchant, &c. for there the Process is given by other Acts of Parliament. It is so to be understood where there is a change of a Party to the Record; but not in case there is no change, but the one dies, and the whole Interest survives to the other. *Ibid.* If

If a Man in Execution at the Suit of the Party sue a Writ of Error, and finds Bail with Recognisance to sue with effect, if the Judgment be affirmed, the Plaintiff shall have no more Execution, for that he had Execution before, but he ought to sue Execution upon the Recognisance. 21 Ed. 4. 67. b.

So if a Man in Execution sue a *Scire fac'* upon a Deed, and the Party lets him out by Recognisance; if it be found not his Deed, he who recovers may not have Execution again, but upon the Recognisance. *Id. ibid.*

If a Man in Execution be bailed by the Court, yet he may be after taken in Execution again. *Per Coke.*

If a Man in Execution upon a Statute Staple or Merchant sue an *Aud' Quer'*, and upon this finds Mainprise, and after doth not prosecute it, or it is adjudged against him, it seems *per Stat. 11 H. 6. c. 5.* that he may be taken in Execution again.

One in Execution upon a Statute *Aud' Quer'*, and does not prosecute it

If a Man recover Debt against B. who is after taken upon a *Capias Utlegatum* within the Year, and put in Prison, although he be in Execution *prima facie*, yet the Party may Elect he shall not be in Execution by this to him, and so have a new Execution by *Capias*, although that the Sheriff suffers him to Escape upon the *Capias Utlegatum*, for he was never in Execution by this at his Election. *Mich. 43 & 44 El. B. R. Shaw and Cutters; sed quere.*

In Execution at Election.

Where one shall have a new *Fieri facias*. If a Sheriff levy Goods by force of a *Fieri fac*°, and does not deliver them to the Party nor return his Writ, the Plaintiff may have a new *Fieri fac*°, for that a Record shall not be avoided by a naked matter of Fact, *Pascb. 1 Jac. 1. B. Per Cur*°.

Sheriff levies Money upon *Fieri fac*°, and upon another *Fieri fac*° returns a *Devastavit*. If *A.* recover against *B.* an Execution *de bonis Testatoris, si non de bonis propriis*, and the Sheriff upon a *Fieri fac*° levies the Money, and after upon another *Fieri fac*° to him directed he returns a *Devastavit*, and upon this a *Scire fac*° is granted against *B.* to shew cause, &c. *B.* may discharge himself of this *Devastavit* by Plea, that the Sheriff levied the Moneys upon the first *Fieri fac*°. *Per Cur*°. *Trin. 11 Car. 1. B. R. Middleton and Powell.*

The reason why one can't have Execution after *Elegit*, but he may after *Cap*°.

It was a Question in *Cowley* and *Legat*'s Case, whether *Legat* the Defendant (in *Aud Quer*°) might have a new Execution by *Ca*'sa after that he had Execution against one of the Obligors by *Elegit*, for it was agreed that a *Capias* does not lie after Execution sued by *Elegit* against the same Person; but after a *Capias* an *Elegit* is grantable, and the reason of the difference is, because upon the Prayer to have *Elegit* it is entred in the Roll, *Elegit sibi Executionem per Medietatem terræ*, so as he is estopped by the Record to have another Execution; but upon a *Capias* nothing at all is entred upon the Record. And *Coke* Chief Justice said, It is the common Practise of a good Attorney to defer the Entry in the Roll of Execution upon an *Elegit*, until the Sheriff hath

hath returned it served: And in such case it was agreed, That if the Sheriff return upon the *Elegit* that the Party hath not Lands, &c. then the Party may take forth a *Capias*, and by the common Law a Man shall have but one Execution with Satisfaction, and therefore at the Common Law if after Execution the Land had been evicted, the Party had no remedy; and if part of the Land be evicted, the Party shall not have remedy upon the Statute 32 H. 8. *Evidion of part of the Land.* *e. 5. Godb. 257. Cowley and Legat. Rol. Rep. 8. Pl. 10. Hob. p. 2.*

Where a Man dies in Execution his Executors are no further chargeable. *Williams and Cutler's Case, Hob. 61.* which was long after *Blomfield's Case.* *In case of Death in Execution.*

If Execution be sued upon a *Stat. Staple*, and upon this the Lands and Goods are extended and delivered to the Conusee; yet the Conusee may have a *Capias* to take his Body also. *Vide 2 Rol. Abr. 476.*

What Execution after a Fieri Facias.

After a *Fieri Facias* returned *Nihil*, he may have an *Elegit*.

So after a *Fieri Facias* he may have a *Ca-capias*. *15 H. 7. 15. 21 H. 7. 19. b.*

If a Man recover Debt against *B.* and levy part of the Debt by a *Fieri Facias* which is returned; yet he may take the Body of *B.* in Execution by a *Capias* for the residue of the Debt. *M. 4 Jac. 1. B. R. Carr and Copping's Case.* *After part levied by Fieri Fac, yet a Ca' Sa' for the residue.*

If

One in Execution by *Ca' Sa'* no *Elegit* or *Fieri Facias* after. If a Man recover Debt against *B.* and afterwards *B.* is taken in Execution by force of a *Cap' ad Satisfaciend'*. The Plaintiff had determined his Election, so that afterwards he may not have *Elegit* or *Fieri Facias*. *M. 43 and 44 El. B. R. per Cur.*

If two are bound jointly and severally, and Judgment given against them upon several *Præcipes*, the Plaintiff shall not have a *Fieri Fac'* against the one, and a *Ca' Sa'* against the other; but he ought to have one manner of Execution against both. *M. 11 Jac. B. vide supra.*

Elegit after *Fieri Fac'* where part is levied. *Elegit* lies after *Fieri Facias* when but part is levied by the *Fieri Facias*, and ought to be recited by the *Elegit*. *1 Sid. Berry and Wheeler's Case.*

In *Bradborn and Varvifor's Case*, *Elegit* was not filed, yet he took out a *Capias* for the rest of the Damages; which *per Cur'* he cannot do unless a *Nilil* be returned. And the Court will not force him to File it, but leave the Party grieved to his *Audita Querela*, but they will not grant a *Supersedeas* as upon a *Scire Facias* after the Year.

C A P.

C A P. VIII.

Of Scire Facias. The Nature and Reason of it. Two sorts of Scire Facias respecting this Subject. Scire Facias is for two Uses. Whereupon a Scire Facias is grounded in a Personal Action. Of change of Parties to the Record. Where and in what Cases Execution may be sued without a Scire Facias (Stat. W. 2. c. 4. explained) tho' many Years after a Judgment. Scire Facias where to be brought. In what County. In what Court. Process in Scire Facias in B. C. and in B. R. Pleadings to Scire Facias. A President of Scire Fac' on Recognizance. With Exceptions taken to the Scire Fac': in Lutwich. In what Cases there ought to be a Scire Facias, and where Execution may be by Fieri Facias, Capias or Elegit without a Scire Facias.

S*cire Facias* is a Judicial Writ going out of a Record, and lies where one hath recovered Land, Debt or Damages, and the Plaintiff hath not sued out Execution within a Year after Judgment; in this case he must first warn the Defendant to shew Cause why Execution shall not be made, and if he cannot be found, or make default, or shew not Cause against it, a second Judgment shall be, that Execution shall be done upon the first Judgment: And in this case the Defendant may plead any Matter arising after the first Judgment, as Outlawry, Release, &c. to prevent the
second

The Law of Executions.

second Judgment and Execution; and yet if he sue out Execution within the Year, he may continue it after the Year without a *Scire Fac'*, *Cro. El.* 12. *More* 671. *Cro. Car.* 23. *Cro. Jac.* 364.

There are two sorts of *Scire Facias* respecting this Subject.

1. *Scire Facias* to revive a Judgment.
2. *Scire Facias* to have Execution.

Scire Facias is for two Uses.

1. To give notice to the Court that they be not surprised.
2. To shew Cause why he should not have Execution.

Note, A *Scire Facias* in a personal Action ariseth upon two things.

1. Laches of time.
2. Change of the Parties to the Record.

That of Laches of time was not properly at Common Law except in some Cases, but in personal Actions if they came not within the Year they could not have it, but they must have begun again and been driven to a new Original; but the

Stat. W. 2. Stat. W. 2. c. 45. gives a *Scire Facias* after the Year. 2 *Inst.* 470. 5 *Rep.* 88. *vide infra* where Execution may be sued without a *Scire Facias* as to time.

As to Change of Parties to the Record, observe this.

Regularly upon the Stat. W. 2. c. 45. A *Scire Fac'* *Scire Facias* cannot be granted but upon a not grant-Record; but in many Cases a *Scire Facias* able but is granted partly upon a Record, and part-upon Record. ly upon such a Suggestion without which no proceeding could be upon the Record.
2 Inst. 470.

Yet in some Cases there may be a change Where upon the Record, and yet there shall be there may no *Scire Facias*. 29 H. 6. 24. 4 H. 7. 7 Cro. be change El. 145. Hill and Tempest, Dyer 203. 180. upon the Carters Rep. 192. Judgment against two, and yet no Execution is taken out, and *Elegit*; one dies, *Scire Fac'*. the other may have a new *Elegit* without a *Scire Facias*.

It is a Rule in Law, alteration of Par- Alteration ties alters the Process, but the alteration of the Court makes no alteration of Process. If a Judgment be affirmed in the Court of Common Pleas, and within the Year the Judgment is affirmed in a Writ of Error in the King's Bench, the alteration of the Court makes no alteration of the Process, but he may have his Writ of Execution within the Year and not be driven to his *Scire Facias*, tho' it has been held otherwise, and now the Common experience and later Resolutions are to the contrary. 5 Rep. Garson's Case, 2 Inst. 471.

One

One not
party to
the Record
as Heir,
Executor
must have
a *Scire
Facias*.

Aliter in
case of a
Statute.

One that is not party to the Record, Recognizance Fine or Judgment, as the Heir, Executor, Administrator, though they be privy, and tho' it be within the Year shall have no Writ of Execution, but are to have a *Scire Facias* to enable them to the Suit, for the alteration of the Parties altereth the Process; *aliter* in case of a *Stat. Merchant* or *Staple, &c.* because the Process is given by other Acts of Parliament. *Id. ibid.* A Surviving Conussee may have Execution without *Scire Facias*, because he is Party to the Record and privy also. *Cart. 181.*

*Where Execution may be sued without a
Scire Facias, though many Years after a
Judgment.*

Annuity.

Recogni-
zance to
pay at se-
veral days.

If a Judgment be given in a Writ of Annuity, the Plaintiff shall have Execution within the Year after every Day of Payment by *Fieri Facias* or *Elegit*, tho' it be many Years after the Judgment. So if a Man be bound in a Recognizance in 100*l.* to pay it Yearly five several Days 20*l.* now immediatly after the first Day of Payment, he may have an *Elegit* or *Fieri facias*, for the 20*l.* and so after the second Day past; yet in both these cases there is above a Year after the Judgment given or Recognizance acknowledged, and therefore the words, *Recens Cognitio, &c.* in the Statute

Statute of *W. 2. c. 47.* that gives *Scire facias*, *Stat. W. 2.*
shall not have relation to the *Teste* of the *c. 4.*
Recognizance, but to the Day of Payment.

2 *Inst.* 471. And tho' the Plaintiff cannot
have Execution within the Year accord-
ing to the Letter of this Statute, yet if he
come within a Year of the Payment it
sufficeth.

If the Plaintiff takes his Process of Exe-
cution within the Year, tho' it be not ser-
ved within the Year, yet if he continue
the same, he may have Process of Execu-
tion at any time after the Year. And so is
2 *Leon.* 77, 78. If one hath Judgment in
Debt, and upon it Sues a *Capias ad Satis-*
faciend' within the Year and Day, tho' he
do not prosecute the same by the space of
2 or 3 or 10 Years, yet he may proceed
thereupon, and shall not be put to a *Scire*
facias, for a Writ of Execution once sued
forth shall be a continual Claim, and the
Party shall never be put to a *Scire facias*.
Quær. For *Manwood* was of a contrary
Opinion, if it be discontinued by a Year
and a Day, that then he shall be put to
his *Scire facias*, Sir *William Waller's* Case.
But in *Rob. Rep.* 104. One hath Judgment
and he continues Process, twenty Years af-
ter Judgment, he may have a *Capias ad*
Satisfaciend' without a *Scire facias*, so if a
Writ of Error be brought and Judgment
is affirmed; so it is if a Writ of Error be
discontinued.

Process of
Execution
continued.

The Law of Executions.

If within the Year a *Levari* or *Fieri facias* be sued forth, and be returned not served, or *Vicecomes non misit breve*, and so the Year passeth in default of the Sheriff; yet the Plaintiff shall not be put to a *Scire facias*. 2 Leon. 87.

In case of
a Stat.

Merchant,

Staple, no

Scire fac'

needful.

Executor

hath Exe-

cution up-

on the

Judgment

in the *Sci-*

re facias,

and not

upon the

first Judg-

ment.

In case of a Stat. Merchant, Staple, &c. there needs no *Scire facias*, because the Process is given by the other Acts of Parliament. 2 Inst. 471.

The Books agree, the Executor himself could not have Execution within the Year without a *Scire facias*, because he was not Party to the Record, and this is observable, he doth not then take out Execution when renewed by *Scire facias* upon the first Judgment, but he hath a Judgment upon the *Scire facias* upon which he goes. 2 Inst. 470.

Scire facias where to be brought.

In what County.

In what Court.

In what County.

Reg.

It is a Rule laid down in our Books, a *Scire facias* ought to pursue the first Action, and to be brought in the same County where the first Action was laid. Judgment was had on Bond against Administrator, the Action of Debt was brought thereupon in Cumberland, the Judgment was by confession;

fession ; the Plaintiff afterwards brought a *Scire fac'* in *Westmorland*, and had Judgment upon two *Nichils*. Whereas the *Scire fac'* ought to have been brought in *Cumberland*, where the Original was brought, and that Judgment on the *Scire fac'* was reversed in the Exchequer Chamber, *causa quæ supra*. *Hob. 6. Cro. Jac. 331. Musgrave and Wharton.* Though those Cases differ somewhat in the Reports, but agree in the main.

In *Sympson and Jackson's Case*, The Defendant had Judgment in Inferior Court, and before Execution the Plaintiff brought Error, and after, because they did not Assign Errors, he brought a *Scire facias quare Executionem non*, and had Execution.

Afterwards his Judgment was reversed for the reason, *ut supra Palm. 324.*

But the Case of *Hall and Wingfeild* seems to be excepted out of this Rule: And it was there agreed, That if a Man recover Damage or Debt upon Trespass or Obligation laid in any other County ; if the Plaintiff will bring an Action of Debt for the Sum recovered, he must lay it in the County of *Middlesex*, and not in the County where the first Action arose, for he must count upon the Record by which it appears to the Court the Cause of Action ariseth in *Middlesex*, where the Judgment was given: But upon a Judgment given in the *Common Pleas* at *Hertford*, and the Record brought into the *Common Pleas* after ; yet the *Scire facias* went to the Sheriff of *Hertford*, and not to the Sheriff of *Middlesex*.

delex, because in the Record it self it appeared, that the Judgment was given at *Hertford. Hob. 196.*

In what Court.

In pursuance of the former, It is laid down as a Rule; one may not have a *Scire Facias* in any Court but where the Judgment is given; therefore in a Judgment in Debt at the Grand Sessions in *Wales*, against a Defendant inhabiting in one of those Counties, and the Defendant dies Intestate, and one who Inhabits in *London* Administers. The Question was, Whether any Execution may be into *Wales*, because he neither Inhabits, nor hath any thing there, and if not, whether that Record may be removed into *Chancery* by *Certiorari*, and sent by *Mittimus* into the *King's Bench* or *Common Pleas*, to the intent to take forth a *Scire Facias* upon it to have Lands out of *Wales*, or Goods in the Hands of the Administrator liable to it there. *Per tot' Curiam in Cur' Ward.* Not, for the reason aforesaid, and if such Course should be used, all Judgments in the Courts of *London*, and Inferior Corporations would be removed and executed here, which would be a great inconvenience to make Lands, or Persons liable to such Judgments, in other manner than they were at the time of the Judgments, wherefore there is no other remedy but to execute such
Judg.

Judgments
to be executed
in their peculiar
Jurisdictions.

Judgments in their peculiar Jurisdiction.

Cro. Car. 34.

Debt was brought in *London* against one as Executor, and upon *Plene Administravit* it was found *pro Quer'*, who assigned the same to the Queen, whereupon a *Scire Facias* issued out of the *Exchequer*, against the Defendant into the County of *Dorset*; the Sheriff returned *Nulla bona*, &c. which *Scire Facias* was upon a *Constat* of Goods in another County. *Per Cur'*, The Debt was well assigned to the Queen, and also that the *Scire Facias* might issue out of another Court than where the Record of the Judgment remained; and that upon a *Constat* of Goods in another County, than where the Writ is brought, or where the Party is dwelling, he may as well have a *Scire Fac'* in another County. 2 *Leoh.* 67. *Noon's Case.*

If a Man recover Debt or Damages, and the Judgment is affirmed in a Writ of Error in another Court within the Year; yet he shall not have Execution there without a *Scire Facias*, because the Court is changed. 15 *H.* 7. 10. b.

PROCESS.

In *B. C.* it is the usual course to have one *Scire Facias* to have Execution, which being returned *Nihil*, the Party is to have Execution. But in *B. R.* the usual course is to have two *Scire Facias*; and if Execution

The course of the Common Pleas. And in *B. R.*

K 2

be

be taken on one *Scire Facias*, its Error and may be reversed. *Cro. Car.* 528. And so is *Marsh p.* 3. upon a Judgment given in *B. R.* there ought to be two *Scire Facias*, one against the Principal, the other against the Bail; but one only is sufficient in *B. C.* and two *Nibils* returned do amount to a *Scire Facias*.

In default
of assign-
ing Errors.

In *Scire facias quare Executionem non*, (which is a spur to cause the Plaintiff to assign Errors) when it is returned *Scire Feci*, and nothing done thereupon Execution shall be awarded tho' there were a Year and Day after the return, and at this time no Judgment is, that there shall be any Execution, nor that any continuance was entred; yet it is not material, for there shall never need any other *Scire Fac'* to be awarded, but Execution shall be taken where there is any default in the Plaintiff, that he would not assign Errors. *Cro. El.* 892. *Andrews and Cromwel's Case*.

It was alleged in a *Scire Fac' quare, &c.* that the Defendant in the first Action died before the day of the Judgment, and that there was a Writ of Error pendant, and that assigned for Error; and the Plaintiff would not proceed by *Scire Fac' ad Aud' Errores*, and the Proceedings were staid till the Trial of the Error. 1 *Keb.* 479. *Cole and Beston's Case*.

Note, A diversity between a *Scire Fac'*, to have Execution upon a Judgment in Debt, and upon a Judgment in a real Action; *vid. inf. tit. Pleadings to Scire Fac'*.

Note,

Note, Execution sued after the Year without a *Scire Facias*, is not void but voidable by Error. In *Patrick and Johnson's Case*, 3 *Lev.* 403. But Execution sued after Error brought is void. 3 *Lev.* 312.

Pleadings to Scire Facias.

What may be pleaded or not.

In a *Scire Facias* to have Execution of That the Damages, it is a good Plea to say, the Plaintiff hath assigned the Damages to the Queen, albeit She hath not levied them. *More's Case*, 671.

Hod and Belton, and tho' the Sheriff had not returned his Writ: So its a good Plea to say, that the Sheriff hath levied them by *Fieri Facias*, tho' he hath not returned the Writ, as *Montney and Andrew's Case* is: *Scir' Fac'* on a Judgment in Debt, the Defendant pleads that upon a *Fieri Fac'* directed to the Sheriff of the County of *Leicester*, for levying the Debt, he by force thereof took divers Sheep of the Defendants for the Debt, and yet detaineth them. *Per Cur'*, It is a good Plea, altho' he doth not alledge that the Writ is returned, and altho' that the Writ is conditional, *ita quod habeat denarios*, for the Plaintiff hath remedy against the Sheriff, and the Execution is lawful which the Defendant cannot resist. *Cro. Eliz.* 237.

Payment
no Plea.

So is *Vesey* and *Harris's* Case: Payment is no Plea in a *Scire Facias* to have Execution or Restitution; yet if levied by the Sheriff upon a *Fieri Facias*, it is a good Plea, because it is grounded upon the *Scire Facias* awarded which he cannot withstand, wherefore it is but reason it should be allowed. *Cro. Car.* 328. 2 *Keb.* 751. *Law* and *Merryweather's* Case.

Scire Facias on a Recognizance, Jointenancy shall abate the Writ. *More*, Case 69.

Payment
no Plea in
a *Scire fac*
to have
Execution,
or to have
Restitution
and why.

In a *Scire Facias* to have Execution, Payment is no Plea in discharge thereof, no more is it in a *Scire Facias* to have Restitution: The Case was, the Wife *dum sola* recovered in *B. R.* in Action on the Case, 26 *l.* 13 *s.* 4 *d.* and had Execution of it. The Judgment was reversed in the *Exchequer Chamber*, and Restitution awarded, and afterwards she takes Husband; the Plaintiff brought a *Scire Facias* to have Restitution: The Defendant pleaded, That after the reversal had, and before the purchase of this Writ he paid to the Plaintiff the said Debt and Costs. *Per Cur'*, The pleading of Payment is ill, because it is grounded and affirmed against a Record; and a Payment being against matter of Record, cannot be a discharge unless by matter of Record. *Cro. Car.* 328. *Vesey* vers. *Harris* and his Wife.

In a *Scire Facias* upon a Recognizance out of the *Common Pleas*, the Conusee must name all the *Terre-tenants* at his Peril, but in other Courts the Writ is general against all *Terre-tenants*. 2 *Inst.* 472.

Note, *Scire Facias* must be shewed in Evidence tho' recited in the *Elegit.* 2 *Keb.* 449 or 499.

RETURN.

Scire Facias on a single Recognizance of Bail is returnable on a common return Day generally, and so is the Course: But where there is a Condition it may be returnable at a Day certain, for the *Scire Facias* on the Recognizance of Bail is grounded upon a new Foundation; but if it were a *Scire Fac'* to revive a Judgment, it may be at a Day certain, and this *Scire Fac'* at a Day certain was quash'd, and the Party left to a new *Scire Facias*, or Debt on the Recognizance. 3 *Keb.* 397.

Scire Facias versus *Bail*.

Trin. 4 Jac. 2. Rot. 171.

Midd. ff.

Condition
of the Re-
cognizance

Alias prout patet Ter Pasch Anno Regni Domini Regis 4 Ric 673. continetur sic Precepte fuit vicecomie cum J. P. de, &c. & J. P. de, &c. in Cur Domini Regis hic scilicet Termino St. Hill Annis dicti Domini Regis nunc secundo & tertio coram Henrico Wedingfeild Mil & sociis suis Justic dicti Domini Regis de Banco apud Westm recognover & uterque eorum recognovit se deber R. B. summam 96 l. quamquidem summam 96 l. iidem J. & J. pro se & heredibus suis voluer & concesser & uterque eorum voluit & concessit de terris & catallis suis fieri & ad opus & usum ejusdem R. levare sub Conditione quod si contingeret judicium in ead Cur hic pro predict R. versus Hen Oliver nuper de, &c. in quodam placito debi super demand 48 l. versus predict H. O. per predict R. Proseque reddi tunc idem Hen predict debitor 48 l. nec non omnia damna que eidem R. occasione detent debi predict versus eundem H. in eadem Curia adjudicac forent satisfaceret vel corpus suum in Executione judicij hujusmodi Prison de le Fleet redderet. Ac licet predict R. B. Administ honorum & catallozum que fuer M. M. vid tempore mortis sue

sue nuper dicte M. M. &c. Termino St. ^{Judgment}
 M. Anno Regni dicti Domini Regis ^{pro Quer}
 nunc tertio coram Edw' Herbert Mil & ^{as Admin}
 sociis suis Justic dicti Domini Regis ^{nistrator}
 de Banco hic per considerationem ejusdem ^{of M. M.}
 Cur recuperasset versus prefat' H. O.
 tam predice debum 48 l. quam 12 l. que
 eidem R. in eadem Cur dicti Domini
 Regis adjudicæ fuer' pro damnis suis
 que habuit occasione detentionis debi il-
 lius unde convicte est prout per Record
 & Process inde in eadem Cur dicti Domi
 Regis hic residend' liquet manifeste pre-
 dict' tamque H. O. corpus suum in Ex-
 ecutione Judic' pred' pred' Prison de le ^{Breach of}
 Fleet non reddidit nec prefat' R. de debito ^{the Con-}
 & damnis predice juxta formam Recog- ^{dition.}
 nitionis predice satisfecit prout ex' insi-
 muatione predice Rich acceperat Rex. Et
 quia, &c. quod per probos, &c. Scire fa-
 cias prefat' J. & J. quod sint coram Ju-
 stic dicti Domi Regis apud Westmon' a ^{Note.}
 die Pasch in quinq' Septimanas ostens' si
 quid, &c. videlicet pred' Johannes quare
 predice 96 l. per ipsum in forma predice
 Recog' de terris & catallis suis fieri & ^{Non debet}
 levari . . . & predice J. ostensue quare p' ^{omitted.}
 96 l. per ipsum in forma predice Recog'
 de terris & catallis suis fieri & levari &
 prefat' Rich reddi non debeant juxta
 formam Recog' predice si, &c. Et moda
 hic ad hunc diem vend' predice R. per M.
 B. Artoz' suum & op' se 4 die versus
 prefat' J. & J. de predice placito & ipsi
 solemniter exace non vend' & Die videlicet
 Basil

Return de
Nihil, &c.

Other Sci-
re Facias
awarded.

Mesne
Return.

The De-
fendant
demands
Oyer of the
Writ, and
of the Sci-
re Facias,
and of the
Recogni-
zance.

The Re-
cognizance
in hec
ve ba.

Basil Firebras & Johand Parsons mo-
do mand quod Nihil hbent nec eorū alter
aliquid het, &c. nec sunt invene nec eo-
rum alter est invene, &c. Ideo sicut pri-
us pzecept est Dic quod per probos, &c.
Scire faciat pzeſae Johanni & Iosepho
quod sint hic in Crastino Sr. Trin ad
ostendend in forma pzed, &c. Ad quem
diem, &c. (ut supra) and the same Return.
Et super hoc pzedice R. per' Executionē
versus pzedice J. & J. de pzedice 96 l.
per ipsos in forma pzedic' Recogn' iur-
ta formam Recogn' pzedic' sibi adjudi-
cari, &c. The Defendant demands Oyer of
the Writ & Scire facias. Et eis Legi-
tur in hec verba. Termino Sancti Hille
Annis Regni dicti Domini Regis nunc
secundo & tertio Hec 1061. continetur
sic Suffer' ff. Pzecept' fuit Dic quod ca-
peret Hen' Oliver nuper de R. in Com
pzedice Yeoman si, &c. & salvo, &c. ita
quod heret corpus ejus hic ad hunc diem
scilicet in Otab Sancti Hille ad respond
R. B. de placito Transge ac etiam in
placito debi super casum demand 48 l.
Et modo hic ad hunc idem vend J. P.
de, &c. & J. P. de, &c. in propriis Per-
sonis suis coram H. B. & locis suis
Justie Domini Regis de Banco hic &
Recogn' & uterque eorum Recogn' se de-
bere pzeſae R. summam 96 l. quam
quidem summam 96 l. iidem J. & J. p
se & Heredibus suis voluer, &c. fieri ad
opus & usum pzedic' R. levati sub hac
Conditione quod si Contingeret judiciū
in

in eadem Cur hic p̄dicte placito debi p̄o
p̄dicte N. verſus p̄ſae H. reddi tunc
idem H. p̄dicta' debitum 48 l. nec non
omnia damna que eidem N. verſus p̄ſae
H. occasione detentō debi illius in e-
adem Curia hic in p̄dicto placito adju-
dicat foren ſatisfaceret vel corpus ſuum
in Executione Iudicij huiusmodi Pri-
ſone de le Fleet reddere, &c. quibus lecta
& auditis iidem J. & J. dic quod breve
de Scire facias ſuit p̄dicta materiaq; Demur.
in eiſdem content minus ſufficient in lege
exiſtunt ad p̄dicta N. Executionem ſuam
p̄dicta' verſus ipſos J. & J. ſuper Re-
cogit p̄ſe hēnd manutēnd quodque ipſe
ad p̄b bre de Scire fac ill ſuper Recogit
ill' fac neceſſe non het nec per legem
terre tenetur reſpondere. Et hoc para-
tus eſt verificare unde p̄o defectu ſuffi-
cient brevis in hac parte iſd J. & J.
per iudiciū & quod p̄b N. ab Executione
ſua p̄dicte verſus ipſos J. & J. occasione
p̄dict' habend' p̄cludantur.

Et p̄dicte N. ex quo p̄dicte breve de Joinder in
Scire facias materiaque in eidem con- Demurrez.
tent ſufficient in lege exiſtunt ad ipſum
N. Executionem ſuam verſus p̄dicte
J. & J. ſuper Recogit p̄dicte habēnd
manutēnd quam quidem materiam ip-
ſe idem N. paratus eſt verificare. Et
materiam ill' nondedicunt nec ad eam
aliqua' reſpond ſed verificationem ill'
admitter omnino recuſant per iudiciū
& Executionem verſus p̄ſae J. & J.
de

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de predictis 96 l. per ipsos in forma predictis Recognitum juxta formam Recognitum pro sibi adjudicari, &c.

These Exceptions were taken to the Scire Facias.

1. It is not alledged that any *Scire Fac'* had been against the Principal. *Sed non alloc'*, for that ought to be shewed of the other Party that no *Capias* issued; and for this see 2 Cro. 97. 3 Cro. 597. Moor 433.

2. That there is a variance between the Recognizance and this Record; for the Suit in the Recognizance is to be intended a Suit in his own Right, and the Suit now mentioned is as Administrator. *Sed non alloc'* for the practice of the Court is to take Bail upon a *Clausum fregit*, and to declare in Debt, as the Case requires. Judgment *pro Quer.*

Note, The *Scire Fac'* in this Case is for the Defendant to shew Cause *quare Executionem de terris & catallis suis fieri & Levare*, (omitting the words *non debet*, 3 Keb. 190.) In *Mantles's* Case, in such a *Scire Facias* against the Bail, those words were omitted, and it was held ill and not amendable; but in this case no Notice was taken of such omission.

Note,

Note also, That after the shewing the Recognition it is not said *prout patet per Record*, and it need not as *Boniton's Case*, ^{*Prout patet per Record.*}
3 Keb. 357.

In what Cases there ought to be a Scire Fac', and where Execution may be by Fieri Fac', Capias or Elegit without a Scire Fac'.

All Executions are to be taken out within the Year after the Judgment, for after the Year no Execution is to be done until there be first a *Scire Facias* sent out, whereupon if there be not satisfaction made, or good cause shewed, the Sheriff shall be commanded to do Execution. *W.*
2. 45. 13 Ed. 1.

If a Man recover Debt or Damages, and the Judgment is affirmed in a Writ of Error in another Court within the Year; yet he shall not have Execution there without a *Scire Facias*, for that the Court is changed. 15 H. 7. 16. b. *vide infra* in *Gar-non's Case*, *contra*.

If a Man recover Debt or Damages in B. R. and after within the Year the Defendant brought a Writ of Error in the *Exchequer-Chamber*, where the first Judgment is affirmed after the Year expired; yet the Recoveror may have Execution by *Capias* or *Fieri Facias*, within the Year after the Affirmance without *Scire Facias*, for the affirmance is a new Judgment. 1 Rol. Abr. 899.

So

Affirmance
as a new
Judgment.

Judgment
revived by
Writ of
Error.

A void
Writ of
Error, no
continu-
ance of
the Judg-
ment.

So if after the Year after the Recovery, the Defendant brought a Writ of Error, and the Judgment is affirmed, altho' that before the Writ of Error brought, the Recoveror was put to his *Scire Facias*; yet this affirmance is a new Judgment, and the Recoveror may have within the Year after the Affirmance, a *Fieri Facias* or *Capias* without a *Scire Facias*, *vide ibid.*

So it is, if he be Non-suited in the Writ of Error, for there altho' there is not any new Judgment given in affirmance of the first Judgment, yet the Writ of Error revives it. *Ibid.*

So if the Writ of Error be discontinued, yet he who Recovers is not put to his *Scire Facias*, for the bringing the Writ of Error had revived the first Judgment. *Vide Sir Henry Bellows and Hanford's Case.* See this Case *infra.*

But a void Writ of Error, as if the Principal and Bail join upon the Statute in the *Exchequer-Chamber* is no continuance of the first Judgment, but the Year and Day being past the Plaintiff cannot have Execution without a *Scire Facias*. *Trin. 9 Car. 1. Barnes and Hill's Case.*

If a Man acknowledge a Recognizance to be paid at a certain Day beyond the Year of the Date of the Recognizance; the Year being past from the Date of the Recognizance, altho' it be within the Year of the Day of Payment, yet he shall not have Execution without a *Scire Facias*. *21 Ed. 3. 22. per Cur.*

If

If a Man acknowledge a Recognizance to be paid at a Day within the Year, after the Date of the Recognizance, in this case he may have Execution by *Fieri Fac'* or *Elegit* within the Year, after the Day of Payment altho' that the Year be past from the Date of the Recognizance. *vid. ibid.*

If a Man be bound in a Recognizance to the King, upon Condition to be of the Good-behaviour, &c. he may not be indicted for breach of the Good-behaviour, whereby *A.* shall forfeit the Recognizance without a *Scire Facias*, for it may be he may plead something to discharge himself. *1 Rol. Abr. 900. Perrew's Case, Smith and Baynard's Case,* and many Indictments have been quasht for this Cause.

If a Man recover Debt or Damages per Judgment, and die before Execution, his Executor shall not have Execution by *Fieri Fac'* or *Capias*, altho' it be within the Year, but he ought to have a *Scire Facias*. *15 H. 7. 16. b.*

One acknowledges a Recognizance to the Chamberlain of *London* for Orphanage Money, and then he afterward acknowledgeth a *Statute Staple* to Sir *Thomas Rivet*, Sir *Thomas* Sues Execution upon the said Statute, and *Liberate*, upon which the Sheriff delivers the Recognisors Houses to Sir *Thomas* (it appears not that the *Liberate* was returned) and afterwards the Successor of the said Chamberlain sues Execution in *London*, by a Precept in nature of an *Elegit*,

Sheriff re-
turns a
former Ex-
tent, and
no Execu-
tion upon
a later
Statute
without a
Scire fac'.

Judgment
is affirm-
ed within
the Year.

Error in
B. R.

git, and the Serjeant delivers a Moiety of the said Houses to the Chamberlain. It was resolved, That the Execution upon the *Elegit* was good : It was objected, Sir Tho. R. was in by matter of Record, where- of notice ought to have been taken, and to have a *Scire Fac'* against him. But per Cur', If the Sheriff had returned the former Extent, and the matter had appeared to the Court, the Plaintiff ought to have had a *Scire Facias*, but now the Execution is good. 4 Rep. 65. *Fullwood's Case*.

After a Judgment, if the Plaintiff within the Year Sue a *Scire Fac'*, he may not have a *Capias* after within the Year, until he had a new Judgment in the *Scire Facias* : I suppose this is in the case of an Executor. 1 Rol. Abr. 900. *Robert and Pising's Case*.

If Judgment be given in B. R. and removed by Writ of Error, and Judgment affirmed within the Year, they awarded a *Capias* or *Fieri Fac'*, the Plaintiff is not put to his *Scire Facias*, altho' it be in another Court, 5 Rep. 88. *Garnon's Case*. *Vide supra*.

Upon a Writ of Error in B. R. of a Judgment in B. R. if continued above a Year ; yet Judgment being at length given, Execution may be taken out without a new *Scire Facias*. 1 Keb. 253. 3 Cro. 364. *Godb.* 372.

Writ

Writ of Error brought of a Judgment in Ejectment, determines by the Death of the Defendant, a new *Hab' fac' possess.* is taken out without suing a *Scire facias*. *Per Cur'*, The Possession is only suspended by the Writ of Error, and that being abated an *Hab' fac' possess.* may be taken out before, or after the Year without any *Scire facias*, whoever be in Possession by what Title soever; but on Judgment for Damages, *Aliter* in Costs or Debt, there must be a *Scire Faci-* Judgment as, for here is a certain Person charged, for Debt, but not so in the other Case, and so on a &c. and Recognizance. reason of the diversity.

And the Court agreed too, an Execution on a Recovery in a *Præcipe quod reddat*, or real Actions may be sued after the Year without a *Scire Facias*, because in such Actions the Party cannot begin again, as in personal Actions he may by Debt, &c. on the Judgment. 2 *Keb.* 307. Year. *Vicars & Obrie.* 351.

The Plaintiff had Judgment, *Octab.* Judgment *Mich.* 10 *Fac.* and no Process of Execution and no Execution was sued out in the Year following; within the but afterwards, 27 *No.* 11 *Fac.* the Defendant brought a Writ of Error returna- Year, Writ of Error ble in the *Exchequer Chamber*. He was Non- in *Cam'* scused for not assigning of Errors: And the *Scace'*, Record remanded in *B. R.* And this Term &c. the Defendant in the first Action being imprisoned for other Causes, it was moved, That he should be in Execution for this Cause: And altho' the Year and Day were past after the Judgment, so as the Plaintiff

Plaintiff was put to his *Scire Facias* to have Execution ; yet forasmuch as the Defendant brought his Writ of Error, he himself had thereby renewed the Record. And Rule was entred, he should be in Execution without a *Scire facias*. *Cro. Jac.* 364. Sir Henry Bellasis and Handford's Case.

C A P. IX.

Of Execution against Lands for a personal Duty, in two Cases, only at Common Law. Elegit, what it is. Levam facias, what. How the Sheriff is to execute the Elegit. The nature of an Extent. How to be done in respect of the Lands in the hands of Purchasers, and in respect of the manner of the Sheriffs executing of it. What Things are extendible, or not; and in the Hands of whom, or not. Where Annuity is extendible. Ancient Demesne. Lands of Joint-tenants of Rent. Copyhold. Elegit, how to be executed. Seisin, how to be gained on Elegit. Elegit, in what Case amendable. Who may execute the Elegit. Part of the Debt satisfied by Elegit. Extent return.

THE Common Law doth not allow Execution of Lands for a personal Duty but in two Cases.

1. In case of the King's Prerogative.
2. Against the Heir on the Lien of his Ancestor. 3 Rep. Herbert's Case, and so it's said, 2 Leon. 85. Ognell and Paston's Case.

At Common Law no Land was subjected to Execution, i. e. no Land of the Debtor himself; but yet the Lands of the Debtor which are descended to his Heir, should be chargeable in Execution to the Ob'igee of the Debtor, in which he and his Heirs were bound. *Per Coke*, This seemed strange, and he conceived in that point Custom

L 2

and

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and Usage had encroached upon the Common Law, and yet he himself hath given a very good reason why it should be so (in *Herbert's Case*) for otherwise the Debt would have been lost.

By the Statute *W. 2. c. 18. Elegit* is given of the Moiety of the Land, and this is the first Act that subjected the Lands to Execution on a Judgment or Recognizance, which is in Nature of a Judgment.

By the Statute *13 Ed. 1. de Mercatoribus, 27 Ed. 3. c. 9. and 23 H. 8. c. 6.* that in Case of a Statute Merchant or Staple, all the Land which the Conusor had at the Day of the Conufance, into whose Hands they shall ever come after, either by Feoffment or in any other manner shall be liable. *Vide Elegit. Extent.*

ELEGIT.

Execution as to Land and Goods.

One upon Judgment in Debt had *Elegit*, and had Land in Extent delivered and returned, and a *Nilil* as to Goods and Chattels, and after he suggested that the Defendant had more Lands, Goods and Chattels in the same County not extended, and upon this had a new *Elegit*, and thereupon had a Lease for Years sold in Execution, and no other Land was found, and so it was returned. It was adjudged upon Argument, that the Sale of the Lease was good, and therein three Things were observed.

1. That

1. That a Lease for Years, and the Goods of the Party may be taken in Execution upon an *Elegit*, notwithstanding one moiety of the Land before extended.

Lease for Years taken in Execution after a moiety of Land extended.

2. That a new *Elegit* may be had upon a Suggestion that the Party hath other Land in the same County, without eviction of the first Land before extended.

3. That upon the second *Elegit*, the Lease for Years was taken in Execution, notwithstanding that the Sheriff had returned *Nihil* as to Goods and Chattels upon the first *Elegit*, and notwithstanding to have Suggestion of the second Writ were of Land, and nothing of Chattels, and notwithstanding no Lands were found upon the second Writ. *Moor* 462. *Honger and Fry*.

Vide this Case, Co. 3. 310. A Man had Lands delivered him in Execution on *Elegit*, and he came and surmised he had other Lands, and prayed a new Writ of *Elegit*. It was held, That if he have accepted of the first Lands upon the delivery of the Sheriff, he cannot afterwards have a new Extent; but if at the first Day of the Return, he wave it, he may then have a new Extent.

If one accept of the first Lands on the delivery of the Sheriff, he cannot afterwards have a new Extent.

ELEGIT.

It is a Judicial Writ, and is given by the Statute either upon a Recovery for Debt or Damages, or upon a Recognizance in

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any Court so called, because the Words of the Writ are *Elegit sibi liberari*, &c. by this the Sheriff shall deliver to the Plaintiff *omnia bona & catalla debitoris* (exceptis bobus & asris carucæ) & *medietatem terræ*, to be done by Inquest taken by the Sheriff.

Executions
against
Land at
Common
Law only
two.

Executions at Common Law were only two: *Levari fac'*, by which the Sheriff was commanded *qd' de terris & catallis ipsius A. Levari faciat*, &c. and a *Fieri facias* which only was *de bonis & catallis*. *Scire facias* is given by *W. 2. c. 4.*

Levari facias, what.

By the Statute *W. 2. c. 18. Cum debitum fuerit recuperatum*, &c. the *Elegit* is given of the moiety of the Land which was the first Act which subjected Lands to the Execution of a Judgment, or of a Recognizance, which is in nature of a Judgment.

Elegit is a Judicial Writ grounded upon the Statute, and lies for him that hath recovered Debt or Damages in the King's Court, against one not able in his Goods to satisfy, directed to the Sheriff to command him to make delivery of half the Party's Lands and Tenements, and all his Goods (Oxen and Beasts for the Plow excepted) *Reg. Or. 129, 229.*

The Sheriff upon the Writ of *Elegit* is to pursue the Direction of the Writ, that is, to deliver to the Plaintiff one half of the Lands that the Defendant had at or after the time of the Judgment, and all the Goods and Chattels that the Defendant hath at the time of the Execution done. But he cannot here do all himself, as he may

may upon the *Fieri facias*, for in this Case the Lands, Goods and Chattels must be found and apprised by an Inquisition, and the Verdict of a Jury, and the same, and the value thereof returned before he can deliver them to the Party, or sell any of them away; and then if there be any Lease for Years, the Sheriff may either sell it, and deliver the Money to the Plaintiff, or he may deliver it to the Plaintiff at an yearly Value.

How the Sheriff to execute it.

But there is a diversity between the Sale of a Term, and the Extent of a Term. If the Sheriff on *Fieri facias* sells a Term for Years, and makes a false recital, the Sale is void; but if he sell the Interest the Defendant had in the Land, the Sale is good.

Diversity between the Sale of a Term, and the Extent of a Term.

But where it was found by Inquisition that a Debtor of the Queen was possess'd of certain Land, *pro termino Quorundam annorum tunc ventur*, this Inquisition was insufficient; for a Term cannot be extended without shewing the Commencement and Certainty of the Term, and the Cause is for that after the Debt satisfied, the Party is to have his Term again if any part of it remain, which ought to appear, and upon this the Party may have remedy to amove the Hand of the Queen or other Person.

4 Rep. 74. Palmer's Case.

J. recovers 120 l. in *B.C. versus G.* and prays *Elegit* against G. to the Sheriff of London (where the Action was brought) and to the Sheriff of Lancaster return' Craft' Pur' after, which was granted, per Cur'.

L 4

After

Elegit to
the Sheriff
of Lanca-
ster.

Elegit
grounded
on a Testa-
tum, yet
no such
Return, is
Error.

After J. the Plaintiff takes *Elegit* to the Sheriff of *Lancaster*, and, as the Course is by *Scire facias*, it is first directed to the Chancellor of the County *Palatine*, and this *Elegit* at the end of it appears to be grounded upon a *Testatum* first made by the Sheriff of *London*, that G. had nothing in *London*, *ubi revera*, he never made such a Return. Upon this *Elegit*, by a Jury before the Sheriff of *Lancashire*, they extend a Lease of Tythes to the value of 100*l.* which the Sheriff delivered to J. the Plaintiff: G. brought Error, and assigns Error in *adjudicatione Executionis (viz.)* that no Return was made by the Sheriff of *London*, nor Filed in *B. C.* and it was adjudged Error; for though he might have taken his *Elegit* immediately out of *London* or *Lancaster*, yet when he waives the Benefit of this, and will ground his Execution upon a *Testatum* by a former Sheriff of *London*, which is false, this makes Error in the Execution, and G. shall be restored to his Term again. For J. being the Party himself, this is not in Law but a bare delivery in *Specie*, which ought to be restored in *Specie* again, and does not alter the Property absolutely, but attends upon the Execution to be good or bad as the Execution; but if the Sale had been to a Stranger by the Sheriff of this Term for 100*l.* although the value was 1000*l.* yet upon reversal he shall not have the Term again, but the Money, *viz.* 100*l.* *Dyer 20 Eliz.* For it is the Folly of the Party that he did not pay the Judgment;
And

And if such Sales shall be avoided, none would buy Goods of the Sheriff. *Relv.* 174. *Goodyer and Ince.* In this Case, *Cro. Jac.* 246. is cited a Case, where a *Cap' ad Satisfac'* was awarded with a *Testatum*, whereas no *Capias* before had been awarded; it was reversed for this Cause. And the difference there is between this Sale and Delivery upon an *Elegit* to the Party himself, and a Sale to a Stranger upon a *Fieri facias*; for the *Fieri facias* gives Authority to the Sheriff to sell and to bring the Money into Court. Wherefore when he sells the Term to a Stranger, though the Execution be reversed, yet he shall not by vertue thereof be restored to the Term, but to the Money, because he comes duly thereto by Act in Law. But the Sale and Delivery of the Lease to the Party himself, upon an *Elegit*, is no Sale by Force of the Writ delivered in Extent, which being reversed, the Party shall be restored to the Term it self, and a Writ of Restitution was awarded.

EXTENT.

The Nature of it.

It is upon the Inquisition of Goods and Land, &c. to seise them into the King's Hands, *ut ei Liberemus*, that is, only to shew the King's Intent; and the Seisure into the King's Hands, makes not any Title to the King, nor puts the Possession in him, but

but is only matter of Form. *Cro. Car.* 458.

In the Case of *Haydon* and *Vavisor* against *Smith*, *Moor* 662. an Extent is thus described, That it is *onus reale inhærens gremio Liberi Tenementi & tous temps Executoire*; If the Tenant by Extent purchase the Inheritance of part of the Land extended, the whole falls: So a Release of the Debt will immediately determine the Extent. True, an Extent is an Execution given by Statute Law for the Satisfaction of the Debt, *ergo* a Release of the Debt determines it; and if the Inheritance of part comes to the Conusee, it destroys the whole Extent; but in other respects the Extent makes an Estate in the Land. It turns the Estate of the Conusor to a Reversion, 1 *Inst.* 250. b. The Conusee, after the Extent, may have Action of Debt for Rent, and distrain and avow for it. He in Reversion may Release to the Tenant by Extent, which will merge his Estate. Tenant by Statute may forfeit by making a Feoffment; he is to attorn to the Grant of the Reversion. Tenant by Extent may Surrender to him in Reversion. 4 *Rep.* 82. 1 *Inst.* 270, 273.

How

How to be done,

In respect of part of the Lands in the Hands of Purchasers. Vide infra Contributors.

If one seised of White Acre, Black Acre, and Green Acre, enter into a Statute, or hath a Judgment against him, and then he Enfeoffs *A.* of White Acre, and *B.* of Black Acre, and keeps Green Acre to himself: In this Case the Conusee or Plaintiff may have his Execution upon the Moiety of Green Acre, and not meddle with the other two Acres, if he please; but he may not in such Case extend a Moiety only in the Hands of one of the Purchasers, but he must extend a Moiety only in the Hands of both, and of all the rest of the Land subject to the Execution. For if he leave out any of it, the Party grieved thereby shall have his *Audita Querela*, and so avoid the Execution. And where there are two or more Conusors in a Statute, &c. there the Lands of them all, and not one of them, are to be extended. *2 Inst.* 396. *Vide* 394.

In respect of the manner of the Sheriff's Executing of it.

Extent on Ejectment: Its said the Defendant was seised of a Rectory of the value of 100 l. and other Lands appertaining *quæ quidem Rectoria sine terris glebalibus* is the Moiety, so that there is more than a Moiety extended; but it appearing that the Rectory consisted of Gleab and Tithes, &c. here it may be understood of the Church-yard, &c. distinct from other Lands pertaining to it: And so the Court agreed. 2 Obj. It is said, That the Rectory delivered was a Moiety not saying according to the value or quantity. *Sed non allocatur.* 3. It is not said *tenend' in seperalitate*, *Sed non allocatur.* 1 Keb. 368. *Berry and Wheeler's Case.*

Practice to extend all the Lands as a Moiety, is avoidable by Ejectment.

Ejectment not to be brought on *Elegit*, &c.

The Sheriff on *Elegit* found the Defendant had Lands in *A.* where he had nothing, and so extended all his Lands in *B.* as a Moiety. This practice is avoidable by Ejectment, and the Evidence may be that the Defendant had nothing in *A.* and the Court directed Not guilty to be pleaded in Ejectment of Lands in *A.* or to File the Writ of *Elegit*, and in Ejectment thereon (or else Ejectment cannot be brought) to plead the same; but they refused on *Affidavit* to refer the Examination of the Inquest to the Secondary. 1 Keb. 859. Lord *Stamford* and *Hubbard's Case.*

If

If two recover against one, and one of the two hath an *Elegit*, and the Land delivered to him, and after the other sueth an *Elegit*, he that last sued can only have a *Moiety* of what was left. *Cro. El.* 482, 483.

In every *Elegit* the Sheriff is to set out a *Moiety* distinctly, unless they be Tenants in Common, and in that case he must shew the special Matter. *Goldsb.* I. 38.

The *Moiety* to be set out distinctly, unless in case of Tenants in Common.

What Things are extendible or not : And in what Cases Elegit lies or not.

Queen *Eliz.* granted under Her Great Seal to one *Allen*, an Annuity of 40 *l.* per *Ann.* for 21 Years, to be paid by her Receiver of her Court of Wards. *Allen* being condemned in 4000 *l.* Damages at the Suit of one *Gilbert York*, and that Verdict affirmed in an Attaint brought as well for the very Matter as for the excessive Damages, and Judgment being given accordingly upon a *Fieri fac.*, this Annuity was sold to *G York* for 500 *l.* *Per Cur.* This Extent and Sale is good ; for being an Annuity certain, for Years certain, and payable by the Receiver, it is in the nature of a Rent-charge for 21 Years, and is well grantable over and vendible, and not like to an Annuity which chargeth the Person only. *Cro. Jac.* 78. In *Cur Ward. York and Twine's Case.*

Where Annuity is extendible.

Antient

Antient
Demesne
not.

Antient Demesne are extendible as well as other Lands. *Hob. 47. Cox and Barnsly's Case, W. 2. c. 18.*

The Sheriff may by *Elegit* extend a Lease for Years as he doth Fee-simple Lands, and not Sell it as Goods. *2 Inst. 394.*

Who shall
have the
Corn sowed
on Ex-
tent.

A. is bound in a Statute to *B.* and Sows the Land, *B.* extends the Lands which is delivered to him in Execution; the Cornsee shall have the Corn sowed; the same thing in case of a Recognizance. *2 Leon, Case 75.*

Goods from
what time
bound by
Elegit.

All the Goods and Chattels are bound after the *Teste* of the Writ of *Elegit*, and therefore after that cannot be filed by the Owner. *1 Goldsb. 39.*

Where the
first Ex-
tent of
Goods, tho
upon a la-
ter security
is good.

If *J. S.* hath a Judgment against *A. B.* and after *A. B.* acknowledgeth a Statute, and upon that Statute (he being Dead) his Goods are taken in Execution, and then upon the Judgment a *Scire Facias* is sued forth, and after a *Fieri fac'* for the Testator's Goods; in this case the first Extent of the Goods will be good and unavoidable. *Goldsb. 1. 37.*

All Land
of Joint-
tenants
charged
notwith-
standing
the release
of one to
the other.

A. and *B.* were Joint-tenants for Life, Judgment was given against *A.* in Debt, who released to *B.* *B.* died. *Per Cur'*, The Land was bound, and *A.* by his own Act could not discharge it, though *B.* were in by the first Lessor, notwithstanding the death of whom, and the Entry of him in Reversion during the Life of *A.* the Land is charged. *6 Rep. 78.* The Lord *Abergavenny's Case.*

If the Chattels are sufficient to pay the Debt, and so may appear to the Sheriff, whereby he may satisfy the Debt, then he ought not to extend the Land for the residue. *2 Inst.* 59. 395.

In what Case the Sheriff ought not to extend the Lands.

In Replevin the Defendant Avows for a Rent-charge, and shews how the Plaintiff's Father was seised in Fee of the place where, &c. and granted a Rent-charge to Sir J. W. younger Brother to the Plaintiff, of 100 Marks *per Ann.* in Fee; and that Sir J. W. granted it in Fee to L. W. and Tenant attorned: That L. C. was indebted to the Avowant by Judgment, and 2 parts of the Rent were extended by *Fieri Facias*, and delivered to him in Execution, and so Avows for 2 parts of the Rent. The Plaintiff Replies, That at the time of the Extent L. C. was possesst of the entire Rent, which might have been extended.

The Avowant Demurs. *Per Cur'*, The Extent of 2 parts of the Rent is good; for tho' by the Act of the Party the Tenant shall not be liable to two Distresses; yet by Act in Law he may, and this Act of the Sheriff is an Act in Law. *Cro. Eliz.* 742. *Wootton and Short's Case.*

Extent of two parts of the Rent upon a Judgment by *Fieri Facias*.

The *Elegit* was *quousque residuum debiti* (nothing having been specified to be before levied) be satisfied; which *per Cur'* is well enough. *1 Keb.* 551. and so *Hob.* 58. *Elegit* may be sued of the residue, after part levied by *Fieri Facias*, if upon the *Elegit* nothing be taken but Goods (because there is no Lands) which are not enough;

nough ; the Plaintiff may have a *Fieri fac* ; but if there be Land extended it is otherwise.

Delivery
of a Man-
nor.

If a Mannor to which an Advowson is appendant, be delivered by the Sheriff in Execution by the name of a Mannor *cum pertin* the Advowson passeth ; *aliter*, if it be delivered in Extent by the name of Lands, Meadows, &c. *Owen* 4.

Copyhold.

A Copyhold is not extendible on an *Elegit*. 3 *Rep.* 9. *Heydon's Case*.

If a Copyholder Lease for Years by License of the Lord, this is not extendible in the Hands of the Lessee. *Poiston's Case*, *Pasch.* 8 *Jac.* B. R.

Lands in
Antient
Demesne
are.

It is said, That it doth not extend to Land in Antient Demesne, for the Statute doth only extend to Land at Common Law, and therefore the Sheriff is not to deliver Lands upon such an *Elegit* ; but on a Statute Merchant, Lands in Antient Demesne have been delivered in Execution and held good. 4 *H.* 7. 11. But *Hobart* and the other Judges thought Lands in Antient Demesne may be delivered in Execution upon an *Elegit* ; yet it is agreed, That no Freehold held in Antient Demesne, could be recovered in the Court of the King ; but in this case though it be true, that the Possession of Land in Antient Demesne is gained by the Sheriffs Act following upon award of the King's Courts ; yet the Land it self was never put in Plea directly in the King's Court. And in 7 *H.* 4. 17. it is ruled, That upon Action of Debt

Debt brought against the Heir in the King's Court, for the Debt of his Ancestor, Lands in Ancient Demesne descended, shall be liable to Execution: And for another Reason the Case is clear, that since the Judgment was good, that the Plaintiff should recover the Debt, and that the *Elegit* did warrant the extending and delivering half his Land, and Ancient Demesne is his Land as well as other, so he had warrant to deliver it, and he is not to dispute what is liable, and what not, neither is the Sheriff nor he that receives it of him subject to an Action of Trespass, as if it were a nullity in the Act, but perhaps if it were releivable the way is by *Aud. Quer.* because there was no time to plead it before. *Hob.* 47, 48. *Cox* and *Barnsly's* Case.

Land in Ancient Demesne shall be extended upon a Statute Merchant, 2 *Roll. Abr.* 472.

Tho' it was agreed, Affize will not lie in the King's Court for him that hath such Execution.

If a Man recover Debt or Damages against a Disseisee of certain Lands, and an *Elegit* is awarded; yet this Lands in the Hands of the Disseisor shall not be extended. *Trin.* 4 *Fac. B. R.* *Vide* 2 *Inst.* 394.

In Debt against an Heir upon Obligation, who had nothing by descent but a seek Reversion, expectant upon an Estate for Life, as I conceive the Plaintiff shall

M

have

Lands in the Hands of the Disseisor.

Seek Reversion.

have Judgment to have Execution of it;
Quando acciderit.

Extent not
to be con-
tinued.

It was prayed that the Extent might be continued, unless the Defendant would pay Principal, Interest and Charges, which was opposed, because there were several Charges by reason of the Extent; and by Law the Plaintiff can have only the penalty of the Bond as recovered 100 l. and 20 s. *Sed Curia*, this is not sufficient without a *Scire Facias* to discharge the Extent. 1 *Keb.* 864.

Relief in
Equity up-
on Extent
against an
Infant.

Tho' one extend a Statute upon an Infant which is void at Common Law; yet he may sue in Equity to have relief during the Infancy. See *Middleton and Shelly's Case*, 1 *Levin.* 197.

If the Sum due by the Statute does not exceed the value of the Land, altho' the Land be but a small matter at the higher value, yet it shall be extended, for the Conusor may have it again. 29 *Ed.* 3. 1.

If there are divers parcels of Land to be extended, and of some of the parcels the Charges upon the Land exceed the value, but the value of all the Land together exceeds the Charge, all shall be extended, for there the Conusor may have it again.

The Sum
due by the
Statute
Merchant.

It was doubted in 29 *Ed.* 3. 1. if the Sum due by the Statute Merchant exceed the value of the Land of the Conusor, whether it shall be extended, altho' the Conusor

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husor shall never have it again, for so in effect he will lose the Fee.

If Lessee for Life of a Rent acknowledge a Statute, and after Release to the Tenant, yet the Rent shall be extended, for this is *in esse* as to the Conusee, being extinct by the Act of the Party. *Hill. 4 Jac. i. B. R. Duncomb and Tillington's Case.*

Rent tho' released shall be extended.

If there are Goods and Chattels to the value of the Debt, the Land shall not be extended. *45 Ed. 3. 12. b.* The Goods and Chattels may not be extended in the Hands of a Grantee.

If the goods and chattels are of the value of the Debt, the Land not to be extended.

If the Conusor Alien a Moiety of his Land, the Conusee may extend that that remains in his Hands, for he may not have Contribution. *3 Rep. 12. b.*

The Office of *Fillacer* is not extendable. *Office of Per Cur', M. 10 Jac. B. R. Fillacer.*

If Tenant *pur vie* the Reversion in Fee be, and he in Reversion acknowledges a Statute, and after grants the Reversion, and after Tenant *pur vie* dies; this Land shall be extended upon the Statute, for it was bound by the Statute. *Trin. 39 El. in Chancery. Per Cur',* So it is of one in remainder in Tail.

Reversion bound by a Statute.

If a Man hath Judgment to recover in Trespass, and had Execution of a Reversion of a Lease for Years, and of the Rent. *Per Cur',* The Rent and Reversion is presently in him, and he may Avow for the Rent without alledging any Attornment of the Lessee for Years. *Moor, Case 30.*

The Law of Executions.

Lessee for Years hath Execution by *Elegit*, of the Moiety of the Rent and Reversion against his Lessor, the Lease being upon Condition. Resolved, It is a suspension of the whole Condition during the Extent. *More, Ca. 1.*

Lessee for Years rendring Rent upon Condition, if Rent be behind the Lessor to Re-enter: A Recovery in Debt is had against the Lessor, and the Reversion and Rent extended by *Elegit*, and given in Execution: It is a good Execution and the Condition suspended, so as if the Rent be behind, the Lessor cannot enter into the other Moiety.

ELEGIT.

How to be Executed.

Elegit ought to be by Inquisition, per Stat. W. 2. c. 8. For it provides, *Quod vicecomes liberet ei omnia Catalla, &c. and medietatem terre sue quousque debitum fuerit Levatum per rationabile pretium*, (which refers to chattels) & extent' (which refers to Lands) and the *rationabile pretium* & extent' ought to be found by Inquisition and Verdict; and this is implied in the Law, altho' it be not so exprest. 4 Rep. 74. b.

A Moiety
of every
thing to be
delivered.

In *Elegit* the Sheriff ought to deliver the Moiety of every thing, and not an entire thing for the Moiety *de tout*, as the Sheriff on Inquisition on *Elegit* returns the Defendant to have 20 Acres in D. and 20 Acres

Acres in S. and delivers the 20 Acres in S. for the Moiety of all, it is void; and this may be avoided in Evidence in Ejectment Evidence. brought for the Lands. 1 Lev. 160. Earl of Stanford and Needham's Case.

Upon Extent the Sheriff returned, that he had extended a Tenement at 20 s. per Ann. but doth not make mention of any House, nor Land, nor Pasture which should make the Tenement. Adjudged, that the Extent was void for the uncertainty. *Moor Rep.*

Remedy on Elegit.

Seisin, how to be gained on Elegit.

In *Jefferson and Dawson's Case*: Council prayed delivery of Possession might be awarded on *Elegit*, which the Court denied, the Party having no Day to interplead; and the Sheriff ought only to deliver Seizure, to enable the Plaintiff to maintain Ejectment, and the Tenant may plead on Actual Possession the Ejectment, or else the Tenant would not to be delivered be turned out un-heard, and so be remediless. Therefore *per Cur'* actual Possession on *Elegit*, ought not to be delivered, and yet if done and why. it is remediless. 2 *Keb.* 243. And in 1 *Keb.* Ejectment 891. *Dakin and Ulm's Case*, Ejectment lies lies not against Tenant by *Elegit*, tho' he be against Tenant by satisfied at the extended Value, but he *Elegit*, tho' must bring a *Scire Facias ad computand'*, but he be satisfied rather a *Venire Fac' ad computand'*.

Recogni-
zance to
be paid at
several
Days.

A Man acknowledgeth a Recognizance of 100 *l.* to be paid at 5 Days, presently after the first Day he may Sue an *Elegit* for 20 *l.* and have the Moiety of the Land delivered to him, and when the second Day is past he may have another *Elegit* for that 20 *l.* and have the Moiety of the remnant delivered to him. *Et sic de cæteris*; they be in effect in nature of several Judgments in Law. 2 *Inst.* 395.

Elegit, in what Case amendable.

It was prayed to amend an *Elegit* returned and filed, being as to the certainty of the Lands, and Value, right, but they are said to be in *W.* which is but the name of the House extended, and no Parish mentioned certain, and it was prayed that, that might be added. *Per Cur'*, It is but reasonable, *Morris* and *Aires*, 20 *Car.* 2. *B. R.*

Who may Execute the Elegit.

Stat. W. 2. c. 8. saith, *Quod vicecomes li-
beret ei omnia Catalla & medietatem terre sue
quousque debitum fuerit Recuperat*, &c. this by
Equity of the Statute shall be extended to
every immediate Officer, to every other
Court of Record of the King, and the ra-
ther for that the Statute couples the *Elegit*
with a *Fieri Facias*, and admits both to be
execu-

executed by the Sheriff, and so a Serjeant at Mace may do both. 4 Rep. 65.

Note. If a Lease be made for Years rendering Rent, with a clause of Distress, and after the Rent and Reversion are extended on a Statute, or seised into the King's Hands for Debt, if the Lessee pay the Rent according to the Extent, the same is not in any Danger of the Condition, for now the Lessee is compellable to pay it according to the Extent. 3 Leon. 113. Bishop of Bristol's Case.

Rent and
Reversion
extended,
the Lessee
pays the
Rent ac-
cording to
the Extent

Part of the Debt satisfied by Elegit.

Debt on Judgment for 2000 l. The Plaintiff being satisfied, 500 l. by Execution brings this Action for the residue: The Defendant pleads, That before this time, &c. the Plaintiff came into Court and prayed several *Elegits* to several Sheriffs; and one Sheriff returned, that the Defendant had only a Lease for Years, which he had extended at so much, but it appears it was determined, and it had satisfied the 500 l. The Plaintiff Demurs. *Cur' pro Quer'*, Action of Debt lies at Common Law in this Case, and the Statute that gives the *Elegit*, was not made to defraud any of their just Debts (tho' it was objected, that by *Elegit* he had made his Election) and here it is executed as a *Fieri Facias*, for that nothing is found but a Chattel, and therefore the Plaintiff may

have a new Action for the residue. 2. If he shall have a new Execution, for as to that the Court was divided.

Extent Returned.

Diversity
between a
Conusor
and a Pur-
chaser.

That he
had ex-
tended a
Tenement,
ill.

Tho' the
Writ and
Return be
right, yet
if entry up-
on the
Roll be
wrong, its
Error.

In Extent on a Statute Merchant issued out against the Conusor, and the Sheriff returned that the Conusor was possess'd of divers Goods, and seised of Lands which he delivered to the Conusee, and that the Conusee accepted of the Land, and because the Sheriff did not return that he had not any other Lands, Goods or Chattels, it was adjudged insufficient, and a new Writ awarded; though many held in the Case of a Conusor it was well enough, but not in the Case of a Purchaser. *Goldsb. 1. 36. Fletcher versus Robinson.*

Upon an Extent the Sheriff returned that he had extended a Tenement at 20 s. *per Annum*, and made no mention of an House or Land or Pasture, which might make the Tenement. *Per Cur'*, It is ill for the Uncertainty, *Moor, Case 28.*

400 l. Debt is recovered against E. Q. who died, and upon a *Scire Facias* into the County of *Surry*, the Sheriff returned *R. Tertent' omnium terrarum & tenementorum in balliva sua que fuer' præd' Ed'*, And Judgment given, That the Plaintiff should have Judgment, and Execution against the said *R.* whereupon *Elegit* was prayed, which was thus entred upon the Roll, *E-legit*

legit sibi liberari medietatem omnium terrarum & tenementorum in Com' Surry tenend', &c. quousque, and lest out *que fuer' præd' Ed'* and, for this Judgment was reversed *quoad Adjudicationem Executionis* upon the *Elegit*, and yet the Writ it self and Return were right; but where the Roll is faulty the Writ will not help it. *Hob. 90. Keer and Gwin's Case.*

If the Sheriff return *quod Conusor is* ^{Return} *Clericus beneficiat' nullum habens laicum feod'* ^{quod est} but *quod beneficiat'* in such a Diocess; then ^{Clericus be-} a Writ of Sequestration shall go to the ^{neficiatus.} Bishop to sequester the Profits, and to deliver them to the Conusee, until he be satisfied. *1 Car. 1. Pope and Bawtry's Case.*

In the Writs of Execution for Lands and ^{Return up-} Goods upon a Statute Merchant, after the ^{on a non} return of *Non est inventus* or *mortuus*, there ^{est inven-} is such a Clause *quod omnia terræ & tene- ^{tus or mort-} *ment' quæ fuerunt le Conisfor præd' die debet'* ^{uus.} *Recog' præd' vel unquam postea ad quorum-* *cunq; manus devenerint, nisi alicui Hæredit' infra* *etat' existent' per discensum Hæredit' discende-* *runt prefat' le Conisee liberar' faceret.* *Reg. Jud. 8.* and there is the same Clause upon the re- *turn of a Mortuus* on *Stat. Stap. & Recog.* in Nature of it.*

P L E A D.

PLEADINGS.

Assignment pleaded before Scire Facias brought. *Scire Facias* against the Conusee of a Statute who had extended, supposing that he was satisfied: He pleads, That before the *Scire Fac'* brought he had assigned over all his Interest, and prays Judgment of the Writ. *Per Hale* the Writ was good seeing he is Party to the Record: The Plaintiff need not take notice of the Assignee unless he please; and if part of the Debt be unsatisfied, it is to be tendered to the Conusee. *1 Vent. 211.*

Plaintiff need not take notice of the Assignee. Extent is sued by the Executrix upon the Statute made to the Testator, and she dies before the Inquisition taken; the Inquisition taken after her Death is void, for the Writ is to appraise and seise into the Hands of the King, *ut ei leberari faciamus* to the Executrix, and she being Dead it cannot be delivered to her, and the Inquisition taken after and returned is void; the Executrix died Intestate, the *Liberate* was sued

Inquisition taken after the death of the Executrix, who sued the Extent is void. by the Administrator, who comes paramount, and claiming immediately from the first Intestate, cannot upon this Extent have a *Liberate*, but he ought to commence *de novo*, and procure a new Certificate, and a new Extent and *Liberate* upon a Statute Staple, or on a Recognizance upon *Stat. 23 H. 8.* in nature of a Statute Staple, a Certificate being made and delivered into the Clark of

Administrator paramount cannot have a *Liberate*, but must commence *de novo*.

of the Crown in *Chancery*, in that case Where the
by a Warrant from the Lord Keeper Executor
he shall have an *Extendi facias* thereup- shall have
on, for this being executed and return- a *Liberate*,
ed is delivered into the Petty Bag; and tho' the
tho' he that procured it be Dead, the Exe- party be
cutor or Administrator is to have a *Libe- Dead.*
rate reciting the former Extent. *Ero. Car.*

45^o. 457. *Clerc and Vere's Case.*

If the Extent with all Costs and Da- If Extent
mages are satisfied by casual Profits; yet be satisfied
the Conusor may not enter, but ought to yet the
have a *Scire facias*, 15 H. 7. 15. b. in as Conusor
much as the Conusee is in by matter of may not
Record, and shall not be disturbed by En- enter, and
try before Answer in a Court of Record. why.

Scire Facias to re-have the Land.

After Execution sued upon a Statute No *Scire*
Merchant, there lies no *Scire facias* to re- *Facias* lies
have the Land upon shewing of a Defea- upon a De-
sance of the Statute, and a surmise of the fea-
performance of it, but he is put to his *Aud' but an*
Quer' Aud' Quer'.

But after Execution upon a Statute Mer- But upon
chant, a *Scire Facias* lies to rehave the Land surmise of
upon a Surmise, that he had paid after the payment
Extent all the Monies shewing his Acquit- it may-
tance, or part shewing the Acquittance,
and brought the residue in Court without
suing an *Aud' Quer'*, for this affirms the
Execution to be good, and that it is satis-
fied by matter ensuing.

And

Scire Fac'
on a Sta-
tute Sta-
ple.

Where he
is put to
his *Aud'*
Quer'.

Scire Fac'
lies on ten-
der of the
Arrears in
Court.

And a *Scire Facias* lies upon a Statute Staple, or Recognizance in nature of it, upon shewing a Defeasance, and alledging of performance of the Conditions, without being put to *Aud' Quer'*, tho' this disaffirms the Execution never to be good, because the Recognizance and Original is in the same Court. 7 H. 4. 31. And it is grounded upon a Deed.

But a *Scire Facias* doth not lie upon the said Recognizance, upon a surmise of any thing which extinguisheth the Recognizance, by matter of Fact before the Execution sued, as upon Allegation of Purchase of Parcel of the Land, or such like; but he is put to his *Aud' Quer'*, for that it is grounded on a matter of Fact. *Com. Ross* 72.

If part of the Monies are levied according to the Extent, and part are Arrear, upon tender of that which is Arrear in Court a *Scire Facias* lies to rehave the Land within the Term, because all appears of Record, what was due, and what was in Arrear. 22 Ed. 3. *Scire Facias* 109.

C A P. X.

Where the Land is extended and the Debt received by the Profits, Whether the Conusor may Enter, or what Remedy he hath for his Land again. Diversity between an Extent upon a Judgment, and an Extent upon a Statute. Of a Scire Facias to avoid a former Extent. Where the Judgmentee, Conussee, shall hold the Land over his time, or have a Re-extent, or new Execution. Stat. 32 H. 8. c. 5. explained. Where, and in what Case there shall be a Re-extent, tho' the Liberate be executed. Where the Conussee shall not hold the Land over. Where Scire Facias shall be against the Conussee or Lessee of the Conussee. Of the Writ of Venire Fac' ad computand'. In what Cases the Conussee shall not hold over. Where the Land is chargeable with two or more Judgments, Statutes or Recognizances, Which shall be first satisfied, and of puisny Judgments being let in. Where, and in what Cases Extent shall be suspended. Of Executions in reference to the King's Prerogative, and of Assignment of Debts to him. Where Extent shall be sued in the Patentees Name or the Kings. Stat. 33 H. 8. c. 39. explained.

AS to this there is a Diversity to be observed.

In case of an *Elegit* upon a Judgment after satisfaction had the Conusor may Enter,

Diversity
between
an Extent
upon a
Judgment,
and upon
a Statute
or Recog-
nizance.

Enter, for he shall not have Damages and Costs, but only the Land extended till the Debt be satisfied, and because all is certain the Conusor after the Extent expired may enter ; but after the Extent upon a Statute Staple, or a Recognizance in nature of a Statute, the Conusee receives his whole Debt by the Land ; yet the Conusee may not enter, but is put to his *Scire Facias*, for in this case the Conusee shall hold the Land, not only till he be satisfied for his Debt and Damages, for detaining the Debt and Costs of Suit, but also for his reasonable Labour and Expences: For the entry of it is thus, *Tenendum ut Liberum Tenementum, &c. quousque debitum præd una cum damnis & custagiis suis necessariis & rationalibus ut in laboribus factis dilationibus & expensis, &c.* which are uncertain ; and in as much as they are uncertain, and the Conusee is in by matter of Record, Reason will, that the Conusor shall bring a *Scire Facias* against the Conusee, before his Estate shall be defeated. Also the Court of Chancery, which awards the Extent and Liberate shall adjudge the reasonableness of the Costs, Damages, Labour and Expences. 4 Rep. 67. *Fulwood's Case*.

But in the case of *Elegit* the words of the entry are, *Tenendum ut Liberum Tenementum quousque debitum præd inde fuerit levatum* ; yet whensoever the Party satisfies and pays the Debt on Record, he shall enter into his Land ; so it is when the Tenant by *Elegit* is satisfied by the ordinary

Extent,

Extent, the Tenant of the Land may enter; but if it be in respect of any casual Profits, there to avoid the Extent he must have a *Scire Facias* in respect of the uncertainty; If the Sum be levied by casual Profits, or if he hold over his Term according to the Extent, *Scire Facias ad computand'* lies.

Of a Scire Facias to avoid a former Extent.

Scire Facias to avoid a former Extent by a Statute extended on the Lands of one S. supposing it to be satisfied by the Profits. The Defendant pleads, one N. was long before Possess as Assignee of the Conusees Interest, and he as Executor of the Assignee pleads this Assignment, and N. was in Possession, and the Defendant had nothing in the Premises, and Issue on the Possession, because there is a *Liberari feci* and actual Possession: But *per Cur'*, Tho' the Sheriff may take notice of the former Execution, yet not of a matter of Fact; but if the Sheriff doth execute the Writ as he may if he will, the Plaintiff who it may be did not know of it shall not be without Remedy; and its all one as the setting forth an Eviction, for the *Liberari* only enables to Sue: And *per Hale* Chief Justice, *Scire Facias* must be against the Party privy to the Conusance as the Conusee, as Error is against the Defendants on a Recovery, but the Tenants shall not be

Scire Fac'
against
the Conu-
see, and
the Af-
signee.

be ousted without another *Scire Facias*; as this case is, when all is received by the Conusee the *Scire Facias* must be against him, but when part is in one time, and part in another, it is good to bring it against both. *Per Twisden*, A *Scire Facias* may be against a Conusee *nec non* to Assignees Executors; also tender in Law must be to the Conusee, tho' the Assignee hath Interest in Equity. The Court agreed the *Scire Facias* must be to all, but inclined it cannot be against the Assignee alone.

If a Stran-
ger, or if
the Party
hold the
Tenant by
Elegit out
of his
Term.

If the Party himself holds the Tenant by *Elegit* out of the Term extended, the Tenant by *Elegit* may hold over; but otherwise, if a Stranger hold him out, there the Tenant by *Elegit* may not hold over against the reversioner, but is put to his Action of Trespas against the Stranger, 2 *Sand.* 23. 4 *Rep.* 82.

Where the Conusee, Judgmetee, &c. shall hold the Land over his time, or have a Re-extent, or a new Execution, and where not.

At the Common Law after a full and perfect Execution made, returned, and of Record no new Extent was to be had in case of insufficient Extent, Eviction, or the like.

Stat. 32
H. 8. c. 5.

But now by *Stat.* 32 *H. 8. c. 5.* concerning Executions of Lands, Tenements and Hereditaments, It is provided, * That if after such Lands be had and delivered in Exe-

* Execution upon a just or lawful Title,
 ' wherewith the said Lands, &c. were li-
 ' able tied, or bound at such time as they
 ' were delivered, or taken in Execution,
 ' shall be recovered, devested, taken or
 ' evicted out of or from the Possession of
 ' any such Person, &c. before such times
 ' as the said Tenants by Execution, their
 ' Executors or Assigns shall have fully le-
 ' vied their Debt and Damages, for which
 ' the said Lands, &c. were taken in Exe-
 ' cution, then every such Recoveror, Ob-
 ' ligee and Recognizee, shall have a *Scire*
 ' *Fac* out of the same Court, from whence
 ' the former Execution did proceed against
 ' such Person or Persons as the former Ex-
 ' ecution was persued, their Heirs, Exe-
 ' cutors or Assigns to have Execution of
 ' other Lands, &c. liable, and to be taken
 ' in Execution for the residue of the Debt
 ' or Damages.

Now this Statute is to give a new Ex-
 tent.

The Persons who are to be relieved Who are
the Parties
to be re-
lieved by
this Sta-
ture. within this Act with a new Execution,
 are such as have Executions upon Judge-
 ments, Statutes Merchant, Statutes Staples,
 and upon Recognizances, and such Re-
 cognizances as are taken either in the
 King's Courts at *Westminster*, or by the
Stat. 23 H. 8. c. 6. 2 Inst. 278.

This remedy is given in case, where the The re-
medy. Tenant by Execution hath no other reme-
 dy given him by Law; for so is the Statute
 by reason whereof the Recoverors, Ob-
 N ligees

The Law of Executions.

ligees and Recognizees have been clearly left without remedy, &c. so that where other remedy is given to him therefore, he is not to be relieved by this Statute; and therefore it is, that if part of the Land be only evicted from the Tenant by Execution, this Statute extendeth not to it, for he is to hold the residue till he be fully satisfied: If the Conusee hath remedy in present for part, or in future for all or part, this Statute extends not to it: And therefore, if one is bound to *A.* in a Statute of 1000 *l.* and by a later Statute to *B.* in 100 *l.* *B.* first extendeth, and then *A.* extendeth, and taketh the Land from *B.* yet *B.* shall have no aid by this Statute; that is, he shall have no new Execution, because after the Extent of *A.* *B.* shall Re-enjoy the Land by force of his former Execution.

So if the Wife of the Conusor recover Dower.

Assignee
is within
the Sta-
ture.

Where the Words of the Statute are (delivered and taken in Execution) yet if after the *Liberate* the Conusee enter (as he may) so as the Land is never delivered; yet he is within the remedy of this Statute for he is Tenant by Execution: If there be several Assignees, and they all evicted; in this Case they are within the Letter of the Act, and shall be relieved, because the whole is taken from them; but an Assignee of parcel of the Land is not within the Act.

Where

Where the Conufee is hindred by taking of the Profits of the Land in Execution by the Act of God, as by Fire, Water, &c. there he is to hold the Land over. *Brook Sect. 226. 2.*

Where the Conufee is hindred of the Fruit of his Execution, by his own Act or Neglect, in these Cafes he shall not hold the Land over, nor have any Re-extent. The Debt is 40 *l.* and he hath 10 *l.* *per Ann.* delivered him in Execution, by which he may fatisfie himself in 4 Years, and in that time he makes a Conditional Surrender to the Conufor, and enters for the Condition broken; he shall neither hold over nor have a new Execution. *4 Rep. 66. 82. Plow. 61. 1 Inst. 290.*

Where a Conufee is wrongfully ejected or disturbed, either by the Conufor himself, or any under him, or by a Stranger in the taking the Profits of the Land, there he may and must (if he will be relieved) bring his Action and recover Damages, these damages shall go towards the satisfaction of his Debt; for, for this disturbance he shall not hold the Land a Day longer, because the Law gives him another remedy. *4 Rep. 66. 82.*

A Man shall not hold the Land over the Term by *Elegit* because the Land was destroyed by War, that he could not take the Profits. *Mich. 19 Ed. 2. Execution 46.*

Stat. 21

Jac. c. 24.

new Exec-

ution in

case of

Death.

Execution

of Body

and Lands.

To what

Statute 21

Jac. shall

not extend.

By the Statute of 21 Jac. c. 24. It is provided, ' That the Party or Parties at whose Suit any Person shall stand charged in Execution, for Debt or Damages recovered, their Executor or Administrator may after the Death of the Party so charged, and dying in Execution lawfully sue forth a new Execution against the Lands and Tenements, Goods and Chattels of the Person so deceased in like manner, as if he had never been taken in Execution.

While one detains a Man's Body in Execution for Debt or Damage, he may not have any Execution of his Lands. 5 Rep. 65. 85, 86. Hob. 53. *Aliter* on a Statute.

If the Conusor of a Statute Merchant, or Staple die in Prison; yet his Lands and Goods shall be extended for the Debt. 5 Rep. 89. And the Conusee shall have Execution against his Heir for the Land.

Note, It is declared by the Words of the Statute of 21 Jac. That it shall not extend to Land sold *bona fide* after the Judgment given, when the Money raised thereupon is paid, or secured to be paid to Creditors in discharge of their Debts.

If the Executor of the Conusee of a Statute sue Execution, and upon the Writ the Death of the Conusor is returned; and also Inquisition found of an Extent of the Manor of B. of which he was seised the Day of the Recognizance entred, and doth not say of what Estate he was seised; in

in this Case the Executor, or the Executors of Executors, if they have received no Profit of *B.* may have Re-extent, although a *Liberate* be executed, for the Estate must be found. *Dyer* 299.

15 *H. 7.* 16. Where a Man is bound by a Statute to pay 40 *l.* and the Conusee sueth Execution upon it, and the Land extended is rated at 10 *l. per Ann.* it shall be intended by a Common Intent, that in 4 Years after the Party may be satisfied, and therefore after 4 Years the Conusor shall have a *Scire Facias*. 15 *Ed. 4.* 5. For the Law will not intend a casualty without alledging of it; and therefore if the Conusor will have the Land within the Term, he ought to alledge, that the Conusee hath levied the Duty by an extraordinary casualty and shew it specially. And so where the Conusor Sues a *Scire Facias*, and the Conusee will hold the Land over, he ought expressly to surmise some extraordinary occasion, wherefore he could not levy the Duty upon the Land within the Term. Conusee of a Statute makes a Lease for three Years, yet it may be that the Duty shall be levied within one Year, and if it be so, a *Scire Facias* shall Issue forth against the Conusee and not against the Lessee, for the Law intends that the whole Estate of the Conusor is not granted, but that he hath a Reversion; *aliter*, if he hath granted his whole Estate, for then the *Scire Fac'* shall be against the Grantee.

Scire Fac'
after the
time of the
yearly
Rent.

Where it
must be
alledged,
that the
Conusee
hath levied
by casualty

Where
Scire Fac',
shall be a-
gainst Co-
nusee or
Lessee of
the Co-
nusee.

When the Conufee is in Poffeffion of the Land by Extent, then he is faid to be *Tenant by Statute*.

Writ of
Venire fac'
ad compu-
tand'.

In what
Cases the
Conufee
shall hold
the Land
over.

Now if it appear that the Conufee be overfatisfied, he fhall answer the overplus to the Conufor, and if he will not Account he may have a Writ of *Venire Facias ad computandum*, in the nature of a *Scire Fac'*.

If the Conufee his Executor be ousted and difturbed in his Execution by the Conufor himfelf, or any other during his Extent, he may relieve himfelf againft the Difturber by Affife or other Action, as another in the like Cafe may do. And if he be evicted or difturbed by one that hath better Right, as by one that hath a former Statute or the like; or by the A& of God, as Fire, Water, &c. in thefe Cases the Conufee fhall hold the Land over after the time of his Extent, until he be fatisfied. *Aliter*, where it is through his own neglect, as where the Lands are delivered to him on the *Liberate*, and he after his Entry makes a Conditional Surrender of them to the Conufor, and after enter for the Condition broken, and by this is delay'd; as where the Land is worth 10 *l. per Annum*, delivered to him for 40 *l.* and he within four years makes fuch Surrender, in this Cafe he fhall not hold after the four Years, for he muft take the Profits upon his Extent prefently. *Dyer* 299. 5 *Rep.* 87. 1 *Inf.* 290. 2 *Inf.* 395, 396.

Profits to
be taken
upon the
Extent pre-
fently.

Term of
the Wife
extended.

If the Term of the Wife be extended upon the Statute of the Husband, the Wife
fhall

shall have the residue after the Death of the Husband. 3 Leon. 157.

If the Tenant by the Statute does not levy the Money by his neglect, so that the Term expires by effluention of time, he shall not hold over. 4 Rep. 67. - *Fullwood's Case*. So if by bad Husbandry. 11 H. 6. 7. If Tenant by Statute Merchant or Staple surrender his Estate to him in Reversion, on Condition, and enter for the Condition broken after the Term expired, he shall not hold over, for the Surrender was his own Act, and he may not by his own Act enlarge his Estate. 4 Rep. 82.

If the Tenant by Statute makes a Feoffment in Fee of part of the Land in Extent, and for this the Conusor enters into the Land, as he may, the Tenant shall not hold the residue of the Land over his Term, because he hath lost the other Land by his own act.

If the Land of the Lessee for Life or Years be extended upon a Statute, and after part of the Land is recovered in Action of Waste for Waste made by the Conusor before the Extent, the Conusee shall hold over the residue over his Term, until Satisfaction of the Sum Arrear. *Aliter* if the Waste were made by the Tenant after Extent.

Where the Land is chargeable with two or more Statutes, Judgments or Recognizances, and how a puisny Judgment, &c. may be let in.

Judgment,
and then a
Statute.

If the Land be first extended upon a Statute, and afterward an *Elegit* upon a Judgment obtained before the acknowledgment of the Statute come also to the Sheriff, the Moiety of the Land extended shall be delivered to the Plaintiff upon the Judgment. 1 *Goldsb.* 38.

He who
Claims by
Judgment
shall be
first satis-
fied.

If two Men claim the same Land, one by Extent upon a Statute, the other by a Judgment the same Term; he who Claims by the Judgment shall be first satisfied. *Yelv.* 224.

Suspension
by Lessee
for Years.

If Lessee for Life makes a Lease for Years rendring Rent, and after enters into another Statute to *J. D.* and after he grants his Estate to *J. S.* by this the Execution of the Statute made to *J. S.* is suspended, and during that Suspension it seems *J. D.* although he be after it in time, may sue and have the Rent in Execution. 19 *Jac. B. R. Harrington's Case.*

Where the
later Ex-
tent shall
enter.

If a later Extent be avoided by an ancient Extent, after the ancient Extent is satisfied, the later Extent shall have the Land according to his first Extent, without any Re-extent, 1 *Goldsb.* 38, 39. and may re-enter without suing forth any new Execution. 3 *Leon.* 298. by *Manwood.*

Scire facias was brought by Tenant by *Scire fac*
Elegit, to avoid a former Extent by a Sta- to avoid a
tute on the Lands of *Smith*, and after his former Ex-
Death, against Ter-tenants, the Conusees tent.
being satisfied by the Profits. Defendants
Plead, One *Norbon* was long before posses- Issue on the
sed, as Executor of an Assignee, (for the Possession
Assignment of the Conusee's Interest was of an As-
to *J. S.* under whom *Norbon* was in Pos- signee.
session) and the Defendants, or any of
them, had nothing in the Premises, and
Issue is thereon, (*viz.*) on the Possession,
which is proper enough: The *Scire facias*
being to remove *Norbon* out of Possession,
especially the Profits, not being allowed
to be received by the Conusee before Assign-
ment; but when all is received by the Co-
nusee it must be against him; but when
part is in one time, and part in another,
its best to bring it against both. Also there
can no other Person be taken notice of but
he that is in Possession. It was said, the
Issue should be on the Assignment, which Issue on the
is the main, not on the Possession, for the Assignment
Action only lieth against such as had the
Interest by the Statute. *Per Hale*, *Scire fac*
fac must be by the Party privy to the Co- against the
nulance as the Conusee, but the Tenants Conusee,
shall not be ousted but by another *Scire and another*
facias; also the Conusee pleading the As- against the
signment cannot be taken notice of unless Ter-tenant,
in Possession. 3 *Keb.* 15. 27. *Brown* versus
Shalton, Executor, See *Cro. Car.* 214.

Statute
entred into
after a Re-
cognisance
first exten-
ded.

Machin enters into a Recognisance of 2000*l.* to *Hind*, and after enters into a Statute of 100*l.* to *Dean*, *Dean* extends his Statute upon the Mannour of *D.* which was *Machin's*, he also having divers other Lands; after *Hind* sues Execution upon his Recognisance, and had the Moiety of the Mannour of *D.* first delivered to *Dean* in Execution, but omits divers other Lands out of his Extent, which were *Machin's* at the time of the Recognisance. Whereupon *Dean* brought *Audita Quer'* against *Hind* in *B. C.* and had Judgment, which was affirmed on Error brought in *B. R.* for *Dean* being in by Judgment, and upon Title by the Extent upon the Statute, ought to have his Land liable to the Extent upon the Recognisance, *pro rata*, and for that *Hind* ought to have included all the other Land of *Machin* in his Extent, as well as the Lands of *Dean*. But if *Dean* had not had his Land by Title, but by Disseisin, or other tortious means, though he ought not to be relieved by *Aud' Quer'*, Yet *Q.* If *Hind* ought to have had *Scire facias* against *Dean* before that he removes his Possession, because he is in by Title. *Yelv. 12. Hind versus Dean. Cro. Eliz. 292. Coke Entr. 236. 2 Anderson.*

Asto Assignment of Statute to the Queen,
vide Prerogative.

Extent

Extent suspended.

Garaway and Harrington's Case more fully reported by *Cro. Jac.*

Debt brought on a Lease for Years made by Sir *John Harrington* to the Defendant ; The Case was, Sir *William Cokein*, Conusee of a Statute, takes a Lease for Years of the Reversion and Rent reserved upon the Lease for Years, Lessee Attorns, the Conusee assigns over this Lease for Years; *Harrington* afterwards being Conusee of a puisny Statute, extends this Reversion and Rent, and afterwards *Cokein*, by vertue of the elder Statute, extends this Reversion and Rent. *Per Cur'*, the first Conusee by acceptance of the Reversion and Rent, and assigning it over, the Extent is thereby suspended during that Term, and the second Conusee might well extend it against him. When the Plaintiff had once lawfully extended, and the Land delivered him in Extent, he may avoid in this Action by pleading the Extent in a former Statute, and shall not be put to his *Audita Querela*, for the second Extent never was lawful, but was suspended by taking the Lease, and the Plaintiff having well extended may well maintain this Action. *Cro. Jac.* 477. *Harrington and Garaway*. And in fo. 569. Error was brought in the *Exchequer Chamber*, for that the Declaration did not comprehend sufficient Title, for it was grounded

Extent in
what Cases
is suspended.

Extent al-
ways to be
by Inqui-
sition.

A Judg-
ment and
Statute.

Statute a-
gainst one
under age,
the Extent
totally
void, and
less in a
puisney
Judgment.

ed upon an Extent, which ought always to be by Inquisition, and the Sheriff himself, without an Inquisition, cannot execute it. And here it is not that the Sheriff return'd the Inquisition, but that the Reversion and Rent were delivered in Extent, and it was held to be an incurable fault.

Tho. Clopton seised in Fee acknowledged a Statute Staple of 2000 l. to *Andrews*. 14 Car. 1. In 16 Car. 1. a Judgment was obtained against *Tho. Clopton* in B. C. of 200 l. at the Suit of *Lucas*. *Tho. Clopton* dies, leaving *John Clopton* his Son and Heir; the Conusees sue an Extent upon the Statute, and in the Writ there are these words, *nisi alicui heredi infra atatem existenti jure hereditario descenderint*. Upon this Writ the Lands are extended, and upon that a *Liberate* in 1651. In 1657. *Lucas* upon his Judgment takes out a *Scire Facias* against the Terre-tenants, and afterwards took out *Elegit* against these Lands of *Clopton*. *John Clopton* when the Extent upon the Statute was taken out was Under-age, when the Judgment and *Elegit* was he was of full Age; The Question was, Whether this Extent upon the Statute being made during *John's* Minority be totally void, not only against the Heir but against all others. *Per Cur'*, It is totally void, so that *Lucas* his Judgment tho' after the Extent is good and not voidable: It is so void that any Stranger may take advantage of it; for the Sheriff had no Authority to extend these Lands descended to the Heir, and
Assize

Affize or Trespass lies against the Sheriff for extending ; and its all one tho' the Heir consent to the Extent upon the Statute, and one may *renunciari juri pro se Introduct'* ; yet he could not quit the right belonging to another which is *Lucas* : Here is no Right gained by the Heir, but preserved to the Heir ; had it been a right newly invested he might have waved it. *Cart. Rep.* 18. *Keit and Clopton's Case.*

If one acknowledge a Statute, and after Judgment is had against the Conusor, the Statute shall be preferr'd, but not against an Executor. 1 *Brownl.* 37.

Execution and Extent in reference to the King Prerogative, Preference; and of Assignment of Recognizances to the King, and by him.

Sir—*Harrison* acknowledged two Judgments in Debt to *A.* upon Bond, and was bound to one *F.* in a Bond bearing Date before the Judgment, *F.* Assigns his Bond to the King, *A.* takes out Execution upon his Judgments, viz. Two *Elegits*, by one he hath one Moiety of *Harrison's* Lands, and by the other the other moiety extended ; then Process issues out of the *Exchequer* for the Debt assigned to the King. *Per Cur'*, The King shall not be preferr'd ; the *Stat.* 33 *H.8.* Stat. 33 abridgeth the King's Prerogative ; the King's Debt shall be preferred when it is in equal Degree, and not otherwise, and here the Subjects Title is Prior to the King's

Where the King's Debt shall not be preferred.

The Law of Executions.

Extent
how to be
made.
Not a Moi-
ety of a
Moiety.

King's, and executed. 7 Rep. *Cecill's Case*, and *Dyer, Stringfellow's Case*. The second Question was, Whether any of the Lands are liable to the King's Debt, for that *A.* hath taken all the Land, whereas by his second *Elegit* he ought to have taken but a Moiety of a Moiety. *Per Cur'*, The two Moieties being extended upon the two Judgments are well enough, because the Judgments are of the same Term and of equal Date. 2 Inst. 55. *Hard. 23.* Attorney General *Yelv. vers. Andrew. Vide 38 Eliz. Cogan and Hunt. 9 Jac.B.R. Burnham's Case* to the contrary.

One in Ex-
ecution for
the King's
Debt, not
to be taken
in Execu-
tion for the
Debt of a
Subject.

If one be in Execution for the Debt of the King, he may not afterwards be taken in Execution for the Debt of a Common Person, because the Body is entire, and the King hath no Peer within his Realm. *Dyer 297. Rol. Rep. 302.*

King's
Preroga-
tive as to
Goods.

The Law favours the King in his Executions for his Debts had in respect of the Lands, Goods and Body of the Debtor, as to his Goods. 3 Rep. *Sir W. Harbert's Case; Hob. 111.*

If the King had Execution against another upon his Chattels, this shall not have relation to the Chattels Personal at the time of his becoming in Debt to the King, nor to the time of the Writ brought by the King; and if they are sold *bona fide* before Execution, and after Judgment for the King, they shall not be put in Execution. 8 Rep 171. but by the Award of Execution they

they are bound ^{13 Rep. 171.} as for his Land. ^{As for}
^{2 Inst. 206. 4 Rep. 56.} Lands.

All a Mans Lands shall be seised on
 Obligation assigned to the King, but the
 Obligee himself could have but a Moi-
 ety.

As for the Body. *Dyer* 197. 296.

Body.

Body, Lands and Goods are liable at Debt as-
 once for a Debt assigned to the King, tho' signed to
 not to the Subject, to whom the Debt was the King.
 originally owing. *Vide Hardr.* 25.

Sir *W. Fleetwood* posselt of an House, &c.
 was Receiver General for the King, and
 enters into 20 Bonds of each 200 *l.* to make
 Yearly Account, &c. and so became in-
 debted to the King, and afterwards bargains Where the
 and sells the said Lease to *J. P.* who en- Sale of a
 ters; the Sale shall bind the King being Lease shall
 but a Chattel, and the Sale was *bona fide*, bind the
 and no Covin. 8 *Rep. Fleetwood's Case.* King.

Tho' the King's Debtor be in Execution *Stat. 25*
 by his Body, or his Land for the King, yet *Ed. 3. c. 13.*
 the Subject may also taken him in Execu- explained.
 tion by his Body, or the *Stat. 25 Ed. 3. c. 13.*
 (where it is said, that the Subjects Execu-
 tion shall cease till the King is satisfied)
 is to be intended of Executions by which
 the King seiserth Lands or Goods, but the
 Body is *tout a tout.* 2 *Roll. Abr.* 158. *Hob.*
 160. *Sbirley's Case.*

If the Conusee of a Statute dies Inte-
 state, and Administration is granted to
 his Wife, who takes *J. S.* to Husband,
 who becomes the King's Debtor, the Chat-
 tels

tels which *J. S.* had in right of his Wife as Administratrix, shall not be extended for this Debt of the King. *Butcher and Roger. 2 Rol. Abr. 158.*

Recognizance of 1000*l.* was acknowledged by *J. S.* to *Comb*, 20 *Eliz.* and afterwards, 26 *Eliz.* the said *J. S.* was bound in Recognizance to *Mabb* in 1000*l.* 27 *Eliz.* *Wall* and *Green*, Executors of *Comb*, sued Execution of the first Recognizance, and the Land of the Conusor was extended at 20*l. per Annum*: Afterwards *Mabb* was Outlawed, by which the Recognizance to him came to the Queen, and Process of Extent issued for the Queen, and it was found that the Conusor had nothing but the Land extended by *Wall* and *Green*, and that it was worth above the 20*l.* it was extended at (40*l. per Annum*) hereupon a *Scire facias* was awarded against *Wall* and *Green*, to answer the Queen for the Surplusage above the yearly value that the Extent was. And they pleaded their first Extent by Inquisition, and that they were

Tho' Lands
be extend-
ed above
the yearly
value, yet
the Queen
shall not
have the
Overplus.

not yet satisfied. *Per Cur'*, the Queen shall not have any Surplusage; for by the Extent they had an Interest and Term in the Land, which shall not be divested by the finding the Surplusage afterwards, and the value is not material; for though now it be of so great value, yet it may be of less value before the time of the Extent incurred, and the Conusor is to bear the hazard, and the Queen hath no such Prerogative to divest it from the Subject, it being lawfully

fully vested in him, especially this Debt accruing to the Queen by a common Person. *Cro. Eliz.* 265. the Queen against *Wall and Green*.

But if the Land had been extended at the Suit of the Queen, then the Execution of the Queen shall hold place, though it were a Statute of puisny date.

Where a Recognizance acknowledged by a Subject is assigned to the Queen, it hath been a Question, if all the Lands of the Conusor shall be extended, or but a moiety, as it shall be at the Suit of the Conusor himself. And, *per Cur.*, all the Lands shall be extended. 3 *Leon.* 240.

On *Extendi fac* on a Statute Staple, the Sheriff took the Lands of the Defendant, and sold the Goods, and returned the Extent in *Chancery*; afterwards a Writ of Prerogative issued forth, that the Sheriff should first levy the Debt of 100*l.* for the King, and he was driven to execute the Prerogative Writ, for that till *Liberate* no Property was in the Conusor. *Quere*, if upon Extent they are not in the Custody of the Law for the Parry, and therefore privileged from all other Executions. *Dyer* 69.

Till *Liberate* no property in the Conusor.

It was found by Inquisition, that *T.* had recovered in Action on the Case for Words against *J. A.* 500*l.* afterwards *J. A.* and *E. A.* purchased Land in Fee, and aliened it to *John Death*. *T.* was Outlaw'd, and so his Debt became forfeit to the King; the *Quere* was, If the King should have Execution of the moiety of the moiety of

O

J. A.

By prerogative the entire moiety.

J. A. or the entire moiety ; and it was resolved he should have the entire moiety, though *T.* should have had but the moiety of the moiety, and this by his Prerogative. *Cro. Jac.* 513. *Le Roy versus John Death*, in *Scacc.*

Extent, whether Sued in the Patentee's Name or the King's.

Patentee of the King of Goods outlawed may Sue in his own name.

Assignment of the King's Debt by a common person is void.

G. T. recovered against *Allen* 400*l.* Damages in Action on the Case, afterwards *G. T.* being Outlawed in a personal Action, died. Queen *Eliz.* reciting that he was Outlawed and dead, grants all his Goods, Chattels and Debts to *Fr. Anger*, to the use of *M. T.* afterwards *Fr. Anger* by Deed assigned that Debt and Judgment to *Twyne*, and notwithstanding an Extent issued in the King's name to extend all the Land which *Allen* had at the time of the Judgment. Quere was, Whether after this Assignment of this Debt by the Queen the King may extend in his own Name for the Benefit of the Patentee, and the Patentee thereby might have the Suit in the King's Name. *Per tot' Cur'*, As the King's Grant of a Thing in Action is good enough, so this Debt which is Forfeited to the King by the Outlawry of *T.* is well granted, and the Grantee may have Benefit to levy this Debt in his own Name as if the King's, tho' he hath not any word in his Grant to sue in the King's Name ; but the Assignment over by *Anger* to *Twyne* is void. *Cro. Jac.*

179. The King *versus Twyne*. For there cannot by Law be any Assignment made by any common person of his Debt.

Tenant in Tail is bound by Recognizance to J. S. and then dies, his Issue doth alien, *bona fide*, the King shall not extend these Lands by the Statute of 33 H. 8. Stat. 33 H. 8. c. 39. explained.
c. 39.

1. Before that Statute the King could not extend Lands in the Hands of the Issue in Tail for the Debt of the Ancestor, because he was bound by the Statute *de Donis*.

2. By that Statute Lands are extendible in the Hands of the Issue in Tail for Debt due to the King by Judgment, Recognizance or Obligation, or other Specialty, and other Cases are out of the Statute.

3. The Alienee *bona fide* is not within the Statute; he is favoured as a Purchaser, and he is a Stranger to the Debt, and comes in upon good Consideration, and Benefit is given against the Issue in Tail which was not before.

4. Debts due to a Subject, and forfeited to the King are not within the Statute, for they are not due to the King by any of the four ways. 7 Rep. 21. Lord *Anderson's* Case.

F. in consideration of Marriage of his Son F. with M. &c. Levies a Fine to the use of himself for his Life, and afterwards to the use of F. his Son, and M. in Tail Special; afterwards F. the Father acknowledgeth a Recognizance to the Queen and
O 2 died,

The Law of Executions.

died, his Wife died, and now the Mannor is extended for the Queen's Debt by *Stat. 33 H.8. Quer.* Whether the Lands are chargeable by the said Statute. *Coke*, They are not chargeable; the words are, *which Ancestor was, is, or shall be indebted to the King*, shall not be intended after the Gift made; for if he first convey his Land and afterwards becomes indebted, it is not within the Statute, the Statutes shall be intended of future Debts after the Statute, (of the Gift of his Ancestor;) this Gift was not a meer gratuity to the Son, but in consideration of Marriage. *Poph. contra*, and *Egerton*. The Father gives to his Son and Heir, it is within the Statute; and yet here is consideration (*viz.*) of Blood, and afterwards as *Coke* reported, the Son and his Lands were discharged. 2 *Leon. 91. Foskew's Case.*

Where Execution to
cease till
the Kings
Debt be
levied.

If Conufee of a Statute Merchant sue Execution against the Conufor, and the Sheriff returns, that he had extended the Lands, but doth not return that he had delivered them to the Plaintiff; and upon this comes one for the Conufor, and saith that he was Debtor to the King, and had a Writ out of the *Chancery*, rehearsing that he was Debtor in the *Exchequer*, and prays that Execution shall cease until the King's Debt be levied; in this Case the Conufee shall not have Execution for Body or Lands until the King's Debt be levied. 41 *Ed. 3. tit. Execution 38.* but Procefs shall continue upon the Roll until the Debt be levied.

Curfons

Curson acknowledged a Statute to *Starkey*, and afterwards he acknowledged another Statute to *Hamden*, who assigned the same to *Fitton*, who assigned the same to the Queen. *Starkey* sued forth Execution upon his Statute, and thereupon the Land of *Curson* is extended, and he hath a *Liberate* of it, *per omnes Barones*. If *Starkey* had Execution upon his Statute before the Queen, his Execution should stand against the Queen, and the Queen should not put him out: And it was further agreed by them, That if *A.* recovers a Debt in the *Common Pleas*, so as he hath Title to sue forth Execution by *Elegit*, and the Defendant sells his Lands, and afterwards *A.* Assigns his Execution to the Queen, that the Queen should not have Prerogative against the Feoffee to have Execution of the whole Land. 3 *Leon.* 328 and 240. *Curson's Case*.

Where and in what Cases the Subjects Execution shall stand before the Queen.

Assignment of a Statute to the King.

B. was indebted to *C.* in 2000 *l.* *C.* made his Wife Executrix and died, she Marries with *F.* who was indebted to the King by Bond, he and his Wife by Deed inrolled. 14 *Jac. in Cur. Ward.* Assign to the King that Statute for the Payment of the said Debt, and whether this Assignment were good or void by the Statute of 7 *Jac.* which Enacts, That no Debt shall be assigned to the King by his Debtor, Accountant, or

Stat. 7
Jac. ex-
plained of
Assign-
ment of
Debts to
the King.

other than such Debts as did before Originally grow due to the King's Debtor or Accountant *bona fide*, and that all other Assignments should be void. *Per Cur⁹*, This is a good Assignment, for tho' this Debt is not due to him Originally, but in right of his Wife who had it from her Testator; yet forasmuch as they have the sole Interest therein, and the Baron who is the King's Debtor discharged it by his Release, It was resolved, That it was all one as if it had been made to him in his own Name, and within the intent of the makers of that Act to be assigned; for the intent of the Statute is only to restrain Assignments of Debts which are not due to the Debtors themselves, but assigned to or by them to other Persons, and Process was awarded for the levying thereof. *Cro. Jac. 524. Fawne's Case.*

It was a Question in Sir *John Webb's Case*, If the King may take Extent of Land in *B. R.* or that it ought to be levied by *E-streat* into the *Exchequer. Pal. 167.*

C A P. XI.

Of the Liberate. Sale of a Bankrupts Goods after the Liberate. The nature of a Writ of Extent. Execution of the Liberate where good tho' not returned. And so of other Executions except Elegit. And why. Diversity between a Liberate and a Cap' ad Sat', and a Scire Facias, and Habere Fac' Possessionem. Where the Conusee may enter without a Liberate. Where and in what Cases a Re-extent shall be or not. In what Cases, and for what Reasons several Elegits may be sued out one after the other. How the Sheriff ought to give Possession on Elegit. Into what County the Elegit to be. Trial. Ejectment not to be brought till the Elegit filed. Where in Evidence he must shew the Elegit filed.

THE Liberate puts the Conusee in actual Possession: If an Extent be made upon a Lessee for Years, the Lessee after a Liberate to the Conusee may plead an Eviction, and not before the Liberate; the Conusee after the Liberate is capable of a Release to enlarge his Estate. 1 Inst. 270. b.

L. and M. Joint-traders were bound to the Defendant in a Statute for a Debt, and being forfeited he sued an Extent directed to the Sheriffs of London, and that by virtue of that Extent they extended the Goods

The Sale of a Bankrupt's Goods after a Liberate, but

extended
before he
became a
Bankrupt.

and returned the Writ and Inquisition into *Chancery*; afterwards *L.* and *M.* became Bankrupts; afterwards the Defendant sued a *Liberate* upon that Extent, and the Goods the same Day were delivered by the Sheriff according to the Appraisment in the Extent; after this the Plaintiff and others sue out a Commission of Bankruptcy, and the Commissioners sell these Goods to the Plaintiff. *Per Cur'*, The Goods extended before they became Bankrupts, and delivered by the *Liberate* after they became Bankrupts could not be sold by the Commissioners, because they being extended are *quasi in Custodia Legis*: And tho' by the Extent the Conusee hath no absolute Interest, nor Property in them until the delivery by the *Liberate*, and at the return of the Writ may refuse them for being overvalued; yet that is for the advantage of the Conusee. For the Extent is a *Capias in manus nostras ut eas Liberar' facias*, and they be as Goods gaged or distrained, which cannot be forfeit by Outlawry, or taken in Execution from the Party, who hath them in Gage or by way of Distress without Payment of the Money; also when the Writ of *Liberate* is sued out, it hath relation to the Writ of Extent, and they be *quasi* but one Extent; and the Goods are so bound by the Extent and Appraisment, that the Conusor hath not any more property in them, but *secundum quid* and not *simplicit'*, that is, if the Conusor refuse to accept them, for it is a conditional

Extent.

Goods
Pawned,
not to be
taken in
Execution.

The nature
of a Writ
of Extent.

onal Writ to deliver them to the Conusee if he will accept them, and when he accepts them they are bound *ab initio*. *Cro. Car.* 148. *Audley and Halsey's Case*.

An Under-Sheriff took an Obligation for his Fees for an Extent serving before the *Liberate*: It was held not allowable, he ought to have staid till the *Liberate*, *Bumpsted* and *Batburst* cited in *Audley and Halsey's Case*. Sheriff's Fees for Extent.

One seised in Fee acknowledges a Recognizance of 250 l. to the Chamberlain of *London* for Orphanage Money, and after he acknowledgeth a Statute Staple to Sir *Tho. R.* Sir *Tho.* sues Execution on the said Statute and *Liberate*: The Sheriff delivers the Lands, but no *Liberate* returned, and it was therefore said the Execution was not duly made, for that Tenant by Statute Merchant is Tenant by matter of Record; the *Liberate* ought to be returned, otherwise he shall be Tenant by Matter of Fact in *Pais*. Also it was said the *Liberate* ought to be returned, or otherwise the time of the *Liberate* executed doth not appear, and the term of the Conusee shall commence from the time of the *Liberate* executed. 2. It appears by the *Liberate*, that the Conusee shall be satisfied all his Costs and Damages, which *tunc* (*viz.*) the time of the delivery of the Land delivered to the Conusee *sustinisset*, so that the time of the delivery is material, and ought to appear of Record. 3. If the Terre-tenant shall be put to sue a *Scire Facias* after the Extent incurred

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incurred by course of time, the *Liberate* ought to appear of Record, so that it may appear to the Court that the time is past.

Execution
of the *Li-
berate* good
tho' not
returned.

4- It would be perillous to purchasers, for they cannot know of Execution by any Search, if the Execution does not appear of Record. But *per tot. Cur.* The Execution of the *Liberate* is good enough, altho' the Writ be not returned, for the Writ is not Conditional, but hath these words, *Et qualis hoc precept.*, &c. and is more strong than the Case of *Cap' ad Sat'* for there are words Conditional, and yet the Execution is good altho' the Writ be not returned; so is *Hab' fac' seisinam*, and generally all other Writs of Execution which are final Procefs, and after which no Judgment is to be given nor no other Procefs: And this Case is not like the Case of an *Elegit*, where Inquisition is to be taken, for there the Writ ought to be returned to the intent that the Court shall adjudge upon the sufficiency, or insufficiency of the Inquisition. 4 Rep. 67. *Fullwood's Case*.

And so o-
ther Writs
of Execu-
tion except
Elegit, and
why.

Pleading
to Debt
per Rent.

Lessee for Years was obliged to pay his Rent: In Debt upon it he pleaded, That the Lessor was bound in a Statute, and upon that an *Extendi facias* was awarded to seise the Lands and Tenements of the Lessor into the Queen's Hands which was executed accordingly; and upon that a *Liberate* was awarded, and mean between the *Extendi fac'* returned, and the *Liberate* awarded, the Rent was incurred, for which he is chargeable to the Queen and demands

mands Judgment. *Curia contra*, For before the *Liberate* awarded *Nihil operatur*, for he remains always Tenant to the Lessor, and chargeable to him for the Rent ; and the Writ before is but of form when it speaks of seising into the Queen's Hands, for it was never seen that Lands were seised upon that Writ. *Cro. Eliz.* 46. *Plain's Case*.

Till *Liberate* no Property is in the Conusee. *Vide supra*, *Dyer* 69.

There is a diversity between a *Liber'*, and a *Cap' ad Satisfaciend'* and a *Fieri Facias*, for the Writs of *Ca. Sa.* and *Fieri Facias* are Conditional ; *Ita quod Habeas Corpus*, or *Ita quod Habeas denarios hic in Curia* ; but contrary in the Writ of *Liberate* and *Hab' fac' Seisinam*, for in such Writs there is not any such Clause, and therefore if such Writs be not returned, the Execution done by virtue of them is good enough. 1 *Leon.* 279. 2 *Leon.* 49. *Penruddell* and *Newman's Case*.

Liberate of a Judgment or Recognizance, is to have the Moiety of the Lands ; but upon Statute Merchant, Statute Staple or Recognizance in nature of a Statute Staple the whole Land ; but after the Execution in these three Cases of the Statute Merchant, Staple and Recognizance, in nature of a Statute Staple returned, the Conusee may enter without any delivery by the Sheriff by force of the *Liberate*. 2 *Inst.* 678.

How much of the Land to be extended on a Judgment or Recognizance, and how much on Statute.

If

Where the Conusee of a Statute sue an Extent, by which the Lands of the Conusor are seised into the Hands of the King, and after a *Liberate* is sued, the Conusee may after enter into the Land before the *Bibe- rate* executed, for this *Liberate* is a sufficient Warrant for his Entry. 1 *Rol. Abr.* 737, 738. *Butler and Willis*, and Sir *Tho. Gerrard* and *Candish's Case*.

Where upon Inquisition *Elegit*, the Land to the party Plaintiff; yet the Plaintiff may enter presently after the Inquisition taken, before the return of it to the Court without any *Liberate* to him directed. 1 *Rol. Abr.* 738. *Lister and Bromley's Case*.

Extent upon Statute Staple, and a Writ of Prerogative issues before the first Extent returned. If upon an Extent upon a Statute Staple against *B.* at the Suit of *A.* the Sheriff extends the Lands and takes the Goods, and seise them into the King's Hands according to the Writ, but he doth not make Livery of them; and after a Writ Prerogative issues out of the *Exchequer*, rehearsing the King's Prerogative to be first satisfied of his Debt, and commands the Sheriff to levy the Debt which *B.* owed to him, *viz.* 100*l.* of the Goods of the Debtor, and if he had not sufficient then to extend his Lands, and this Writ is delivered to the Sheriff after the return of the first Writ of Extent, but it was not returned at the Day; In this Case the Sheriff ought to execute the Extent for the King's Debt, because the property of the Lands and Goods

Goods was not in *A.* before they were delivered to him by a Writ of *Liberate*, and therefore liable to the King's Extent. *Dyer* 62. *Stringfellow's Case*.

After the Death of a Conusee in a Statute his Administrator sued forth an Extent, and the *Liberate* being returned he made an Assignment of the Land without an actual Entry, without executing the Deed upon the Land. *Per Cur'*, This Assignment is not good; for by the return of the *Liberate* the Administrator had no right, only a possession in Law, *Quousq; de debito fuerit satisfactus*: The proper way had been to bring Ejectment upon the *Liberate* to recover the Possession, and then the Assignment had been good. *Vide Plow.* 423. *1 Inst.* 270. a. 4 *Mod.* 48. *Hannam and Woodford's Case*.

Administrator of a Conusee upon Extent and *Liberate*, made Assignment of the Land ill, and why.

RE-EXTENT.

Where, and in what Cases a new Elegit shall be, or not.

Note; After one *Elegit* returned, they cannot have another *Elegit* without Continuance. But *per Cur'*, The Course is not to make Continuances on the Roll, but awards severally: And *per Cur'*, If *Nihil* be returned he may have a new *Elegit*, but if an Acre be returned he can have no more.

Continuances.

If one Acre be returned.

A Re-

A Re-extent may be granted as well for the Plaintiff as the Defendant, if they come at the Day that the Extent is returned.

Several Elegits may be sued out one after another.

For defect of the } Writ.
 } Return. vide Post.
 } Of executing it by the Sheriff.

Defect in
recital of
the Writ.

Elegit issued out after Judgment, and the Writ recited the Judgment, *quod Elegit Executionem* of the Goods and Moiety of the Lands, but the Writ omits these words, *Et medietatem terrarum & tenementorum prædictor*, and it could not be amended, but he was put to his new *Elegit*. Cro. Car. 162. Walker and Richards, because the Sheriff had no Warrant to extend these Lands.

Return of
the *Elegit*.

It was returned upon *Elegit* that the Sheriff delivered *Medietatem terrarum & tenementorum* in Extent, and after the Filing and Entry of it upon the Record, the Plaintiff moved to quash it, because it was insufficient; for the Sheriff ought upon such Execution to deliver the Possession by Metes and Bounds. Per Hales, in as much as it appears by the Record to be void, it shall be quash'd; as if upon Ejectment to recover Possession upon such a Return, it appears upon the Evidence, that there was more than half the Land delivered, this shall be avoided. 1 Vent. 259.

How the
Sheriff
ought to
give Posses-
sion on *E-
legit*.

Inquisition

Inquisition on an *Elegit* was quash'd, because the delivery of the Sheriff is shewed to be of so many Acres; though those Tenements deliver'd were a Moiety, or delivered as a Moiety, yet it's ill, though the Computation of the whole be certain, and the Lands delivered appear to be but a Moiety. 2 *Keb.* 534. *Powell* and *Harris*. It must be expressly a Moiety.

Elegit was partially executed on the Oath of one Witness, the Jury extend 15 *l.* *per* *Ann.* at the value of 4 Nobles. *Per Cur'*, This is no Cause to quash it; *contra*, if he had extended three Parts for a Moiety. And here they cannot force the Extenders at the Return of the Writ as one may do upon a Statute 2 *Keb.* 153. Partially executed.

Upon *Elegit* of more delivered by the Sheriff, it is void for the whole. 1 *Syd.* 91. Of more, is void of the whole.

In *B. R.* it was pray'd to have an *Alias extendi facias*, on discovery of more Lands after the Filing of the former, as is used in *B. C.* and so of discovery of Lands in other Counties; for this Court hath no Jurisdiction till Filing the Return. The Court and Clerks agreed, That on an *Elegit* in this Court no Re-extent can be in the same County. 2 *Brownl. Pl.* 47. No Re-extent can be in the same County.

Keeling and *Twisden* said, the same Law is in Extent on a Statute Merchant. A Statute Staple is never returned in *B. C.* nor in *B. R.* but into the Petty Bag. And it was held in *Kinaston's Case*, in 1656. and adjudged in *B. C.* in Ejectment, that before Filing a *Testatum* lies upon the Return into all Where the Statute Staple is to be returned.

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all Counties, but after Filing the Debt is gone. 2 *Keb.* 314. *Wares* and *Ayshford*.

Statute Staple was certified into the Chancery at *Exon*, and *Extendi fac'* there awarded, returnable in *B. R.* and the Extent Filed, no Re-extent shall be after, though more Land is discovered. *Syd.* 351.

One recovered Debt, and had *Elegit* in *Com' Monmouth*, upon which the Sheriff returned that he had no Goods or Chattels, Lands or Tenements within his County whereof he might make Execution; and a *Scire facias* was prayed and had for the Plaintiff against him. And it was held, that before the Year ended he can have no manner of Process to have Execution; but after the Year ended he may have a *Scire facias*, and after that another *Elegit*. And it was held, That he may sue several Writs of *Elegit*, (*viz.*) in every County one *Elegit* of the entire Sum. And *Dyer* said, That the Plaintiff may divide his Execution. As if a Man recover 20 *l.* he may have in one County an *Elegit* for 5 *l.* &c. *More, Case* 83. *Earl of Worcester's Case*.

Vide Goodyer and Ince's Case.

It appeared not in what County the Lands extended were, but *Monmouth* being in the Margine, and the Writ directed to the Sheriff there, and the Return by him, it shall be intended in *Monmouth-shire*, and the Court would not quash it.

In Cases where the Inquisition or Ex-^{In what} tent taken or made is insufficient, as if part ^{Cases a} of the Land be extended in the Name of ^{new Ex-} all the Land, or it is found the Conusor ^{tent.} was seised of the Land, but saith not of what Estate, or the like, the Conusee may have a new Extent called a *Re-extent*; and this he may have though the Lands and Goods are delivered to him by *Liberate*, if he hath not entred upon, and accepted it; but if he once accept it, he may not after this have a *Re-extent*.

It appeareth by the Preamble of 32 H. 8. and by divers Books; That after a full and perfect Execution had by Extent upon Inquisition returned of Record, there shall never be any *Re-extent* upon any Eviction; but if the Extent be insufficient in Law, there may be a new Extent. 1 *Inst.* 290.

If one accept of Land upon an Execu-^{Acceptance} tion upon an *Elegit* delivered by the ^{waving.} Sheriff, if the Writ be returned he may not after wave it and have a new Extent; *Aliter*, if he wave it at the Day of the Return of the Writ. 3 *Cro.* 310.

Where Lands are extended by mistake; there regularly a new Extent or *Re-extent* is to be had. *Cro. Jac.* 639.

If one have Land by Execution by *E-Preroga-* ^{tive.} *legit* upon a Judgment had against a Man, and the King oust him by his Prerogative for the Recovery of his Debt; in this Case, when the King is satisfied, the Plaintiff may have a *Re-extent*. But this may not be done upon a bare motion, but it must

Scire fac'. be by *Scire facias* to the Conusor, to shew Cause why a Re-extent should not be granted, and upon a Certificate that the King's Debt is satisfied. 1 Leon. 279.

Prerogative. The Queen, because the Lord S. was indebted to her, by Prerogative ousted the Tenant by *Elegit*. It was moved and surmised to the Court, that the Queen was satisfied, and therefore a Re-extent was prayed, but the Court would not grant it, because they were not certain of the Matter, but advised the Party to sue a *Scire facias* against the said Lord S. to know and shew Cause why a Re-extent should not issue forth, the Queen being satisfied. 1 Leon. 272. Lord Stafford's Case.

No Extent of the residue, by reason of acceptance. Where a Man doth sue Execution upon a Statute Merchant or Staple, and part of the Land is extended in the Name of all the Land, which is returned accordingly, and the Party accepts it, in this Case he shall never have an Extent upon the Residue of the Land. Bro. Sect. 127.

Extent filed, and after more Lands discovered. Statute Staple was certified in Chancery from *Exon*, and *Extendi fac'* there awarded, and returnable in *B. R.* and Extent filed, and after it was discovered that more Lands were omitted, and it was moved in *B. R.* for a Re-extent, but it would not be, for as much as the Extent is filed. Syd. 356.

If *A.* recover Debt or Damages against *B.* and upon an *Elegit* sued a Term is delivered to *A.* in Satisfaction of the Debt, although

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although it is of more value, yet no Re-
 extent shall be granted; for here it is not
 delivered as an Extent of the Land, but as
 a Chattel to the Plaintiff in Recompence of
 his Debr. *Hill. 11 Jac. 1. C. B. Cummin and
 Bradlin.*

No Re-ex-
 tent grant-
 ed after a
 Term deli-
 vered.

Tryal.

The Sheriff on *Elegit* found the Defen-
 dant had Lands in *A.* where he had no-
 thing, and so extended all his Lands in *B.*
 as a Moiety. This Practice is avoidable by
 Ejectment; and the Evidence may be that
 the Defendant had nothing in *A.* and the
 Court directed Not guilty to be Pleaded
 in Ejectment of Lands in *A.* or to File the
 Writ of *Elegit*, and in Ejectment thereon
 (or else Ejectment cannot be brought) to
 Plead the same. *1 Keb. 859. Lord Stamford
 and Hubbard.*

Ejectment
 not to be
 brought till
 the *Elegit*
 filed.

When he that Sues out the *Elegit* brings
 Extent to try the Title; on Not guilty
 Pleaded he must in Evidence shew the *E-*
legit filed. *2 Keb. 153. Bradborn and Va-*
visor.

Where in
 Evidence
 he must
 shew the
Elegit filed.

C A P. XII.

Of Statutes. Statute Merchant, what : Statute Staple, what. The Nature of them. Who shall proceed in Execution in Case of the Death of the Conusee, or not. The manner of making a Statute. Causes to avoid a Statute. Inrollment. The Form of a Statute Merchant. Proceedings on a Statute Merchant. The Form of a Statute Staple upon the Stat. 23 H. 6. Assignment of a Statute to the King ; vide supra.

Of Statutes and Recognizances.

STatutes are such as concern Subject and Subject, or between the King and a Subject. This is a common Assurance or Obligation of Record. They are called Statutes, because they are made in pursuance of, and according to the Form of some Statute expressly and particularly provided, which directs in what manner it is to be made, and before what Persons to be acknowledged.

Statute
Merchant,
what.

The *Statute Merchant* is a Bond acknowledged before one of the Clerks of the Statute Merchant, and Mayor, or Chief Officer of Cities or Towns, Bayliffs of Boroughs, or others for that purpose appointed, Sealed with the Seal of the Debtor or Recognisor, and of the King, the greater

to

to be kept by the Mayor, &c. the lesser by the Clerk: As in *London* before the Mayor or two Merchants of the said City; *York*, *Coventry*, &c. This is Founded upon the Stat. 13 Ed. 1. Stat. *Aſton Burnell*, or Stat. *de Mercatoribus*. As for the Form, *vide poſt*. Though this Statute was at firſt ordained and uſed for Merchants only, yet now it is become one of the common Affurances of the Kingdom: So is the *Statute Staple*.

The *Statute Staple* is founded on 27 E. 3. Statute Staple. c. 2. it is acknowledged before the Mayor of the Staple, in the preſence of one of the two Conſtables of the Staple, and ſealed with the Seal of the Staple. The Staple doth ſignifie this or that Town where Merchants uſed to carry their Commodities, as *Wooll*, &c.

And now by the Stat. 23 H. 6. a *Statute Staple*, improperly ſo called, may be acknowledged before one of the Chief Juſtices, before the Mayor of the Staple at *Weſtminſter*, or the Recorder of *London*. It is ſealed with three Seals, the Seal of the Conuſor, the Seal of the King, and the Perſon before whom it is taken.

Note, They are all of one Effect as to Execution.

All Bonds concerning the King ſhall be of the Nature of Statute Staples.

Plaintiff ſues the Defendant on Bond for Payment of Money: Defendant pleads in Bar, *Qd' quer' poſt diem ſolutionis pecunie*: and

It is but an
Obligation
recorded.

before the purchase of the Writ accepts a Statute Staple for the same Debt, and in full Satisfaction of the said Obligation; Plaintiff Demurrs, and adjudged for the Plaintiff; for a Statute Staple is but an Obligation recorded, and one Obligation, being of Record, or not of Record, shall not merge another. 6 Rep. 45. *Brathwait's Case* cited in *Higgen's Case*.

To have Execution of Body, Lands and Goods is a Prerogative of the King, but in Case of Statute Merchant, Staple and Recognizances of that Nature a Subject may have, for that is by Statute Law, as in *Blumfield's Case*. *Vide Hob. 60.*

Note, Judgment in a Court of Record is of a higher Nature than a Statute Merchant, Staple or Recognizance, acknowledged by assent of the Parties, without Judicial Proceeding. 6 Rep. 45.

Who shall proceed in Execution in Case of the Death of the Conussee.

If the Conussee sue Execution *per Capias* returnable in *B.* and upon *non est Inventus* returned, sues another *Capias* in *B.* before the return of which he dies, thereby the Suit is determined, and he ought to commence all *de novo*. *Dyer 180.*

Vide Vere and Cheve's Case.

If Conussee of a Recognizance in nature of a Statute Staple sue Execution, and after the Extent made, and Seizure into the

the Hands of the King, the Conufee dies, it feems his Executor fhall not have a *Liberate* upon this, for that the Suit was abated by the Death of the Conufee, and his Executor ought to commence *de novo*.

The Manner of making a Statute.

There muft be a certain Day of Payment limited in it.

And yet one *Davis* acknowledged a Statute Merchant to *J. M.* the Statute was formal in all Points, faving that no Day of Payment was limited in the faid Statute. Upon Demurrer to an *Audita Querela*, the Statute was adjudged to be good; for when it appears by the Statute when the Money is to be paid, it's well enough, as it doth here (*viz.*) prefently: There ought to be a time certain when the Money fhall be paid, either an actual time or a legal time; if it be to be at *Michaelmas* after *J. S.* fhall come to *Pauls*, it is not good, becaufe it may not appear to the Mayor judicially when to make Execution. *Winch* 82. *Hickford* and *Machin*. *Jones Rep.* 52. *Bridgman Rep.* 16. *Mefme* Cafe. *Vide Bendl.* 144, 145. *contra.*

Davis acknowledged a Statute Merchant at *Gloucefter* in 300 *l.* and the Statute did not limit any Day of Payment, and yet an Extent was fued, and upon motion a *Supersedeas* was awarded; for it is no Statute, for the Authority therein given is

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not pursued: For the Statute of *Acton Burnell* saith, if the Debt be not paid at the Day; so the Statute appoints a Day certain. *Davis* and *Hatton*.

If the Statute Merchant be not sealed with the Seal of the Debtor, and there be not a Seal of two pieces annexed to it this is no good Statute, neither can it take Effect as a Statute. 35 *El. Hollingsworth* and *Ascue*, but it shall take Effect as an Obligation. 2 *Rob. Abr.* 149.

Audita Quer.

Causes to avoid a Statute.

An *Audita Querela* was brought to avoid a Statute Merchant taken before the Mayor of *N.* surmising in his Writ two Causes to avoid the Statute. 1. The Mayor there had not such Authority to take the Statute. 2. *Qd' scriptum recognit' &c. non fuit sigillat' cum sigillo Regine duabus peciis propriis pro sigillatione Statut' Mercator'*; And upon this Writ the Plaintiff Counts, and alledgeth these two Matters. *Per Cur'*, either of these Causes alledged was sufficient to avoid the Statute; but the Count is double, and so vitious. *More* 738. *Worsley* and *Charnock*.

Statute Staple, how to be sealed.

The Statute Staple is to be sealed with the Seal of the Conusor, and the Seal of the King appointed for that purpose, and with the Seal of the Chief Justice, Mayor and Recorder, before whom it is acknowledged, and they before whom it is taken to subscribe their Names to it.

Bare Recognizance

Those that are meer Recognizances, as before a Master in *Chancery*, &c. need not be sealed, but they must be enrolled. *Cro.*

Eliz.

Eliz 355. 1 *Leon*. 228. *Ascue* and *Fotan's* Case.

INROLLMENT.

Statutes and Recognizances must be inrolled, and being inrolled they bind Persons and Lands; as a Record from the Day of the entry of it upon the Roll, its a Recognizance from the first acknowledgment, and binds as a Record from that time. 2 *Rol. Rep.* 382. *Allen P.* 12. *Stiles* 9.

But now by the Statute of *Frauds* and Statute of *Perjuries*, the Day of the Month and Year of the Inrollment of the Recognizance, shall be set down in the Margent of the Roll, where the said Recognizances are to be acknowledged; and no Recognizance shall bind any Lands, &c. in the Hands of any Purchaser *bona fide*, and for valuable Consideration, but from the time of such Inrollment. *Stat.* 29 *Car.* 2.

And note, All Statutes Merchant and Staple, are to be brought to the Clerk of the Recognizances within four Months, and inrolled within six Months, *viz.* 28 Days to a Month, or else they will be void as to Purchasers. 27 *Eliz.* c. 4.

And by the *Stat.* 27 *Eliz.* c. 4. All Statutes Merchant and of the Staple, shall within six Months after the Acknowledgment, be entred in the Office of the Clerk of the Recognizances taken according to the *Stat.* 23 *H.* 8. 6. and the Clerk thereupon shewing the same, shall make entry

The Law of Executions.

entry thereof, for which he shall have 8 s. and no more.

Every such Statute which is not within four Months after the Acknowledgment thereof, delivered to be entred accordingly shall be void, against the Purchaser of the Lands chargeable therewith, and against his Heirs, Successors, Executors and Assigns.

The said Clerk shall within the said six Months make entry of every Statute to him delivered, as aforesaid, and thereupon shall indorse the Day and Year of such his Entry with his own Name, in pain to forfeit for every Statute so brought to him and not entred, as aforesaid, 20 l. to be divided between the Queen and the Prosecutor.

The Form of a Statute Merchant.

Noverint Univerſi per Preſentes me A. B. in Com W. Generoſum (or Mercator) teneri & per hoc preſens ſcriptum de Stat Mercator firmiter Obligari C. de D. in Com G. Sed in Quingent li-bris bone & legalis monete Angliæ ſol- vend eis C. D. aut ſuo certo Attorū Executors & Assignae ſuis Et ſi non fecero volo & concedo qđ currant ſuper me Heredes Executors & Administra- tores meos diſtinctiones & pene premiſſe in Stat edito in Parliamēt Dom Ed- ward primi quondam Regis Angliæ apud Aton Burnell Weſtū pro debitis Mer- catorum recuperandis. Dac, &c.

Proceed-

Proceedings on a Statute Merchant.

When you have the Statute, carry it to the Clerk of the Crown in Chancery, and he makes a *Capias si Laicus* which of course you must return, *quod infra nominatus A. B. Laicus est & non est inventus in balliva mea or est mortuus*, which you Copy and File with the *Custos brevium*, who makes out an Extent to any Sheriff of as many Counties, as the Defendant hath Lands in ; whereupon the Sheriff impanels a Jury, and inquires of the Goods and Chattels, Lands and Tenements of the Conusor, and returns all he can find, and then the Plaintiff Conusee brings Ejectment for the Lands ; and an Action of Trespass against any one who detains the Goods from him.

The Form of a Statute Staple improperly so called upon the *Stat. 23 H. 6.*

NOverint, &c. me A. B. de, &c. teneri & firmiter Obligari C. D. de, &c. in centum libris sterling solvend eis C. D. aut suo certo Attornat hoc scriptum ostend Heredibus vel Executoribus suis in tal festo, &c. prox' futur post hoc presentium. Et si defecero in solutione debiti p'ed volo & concedo quod tunc currat super me Heredes & Executores meos pena in Statuto Stapul' de debie pro
Mer.

*Merchandis in ead emptis recuperand
ordinat & probat Dat tali die Anno Reg
Regis, &c.*

P L E A D I N G.

In *Goldsmiths* and *Sydnor's Case*, The Statute was pleaded by Administrator, and saith not *per Scriptum suum Obligatorium*, nor *secundum formam Statuti*, and it is not good, *per Cur.* 4 Rep. 64. Cro. Car. 363.

If a Recognizance hath some defect in it, as if taken by him that hath not Authority, and be put in Suit, and the Party admit it in Pleading to be good, he may not after avoid it. 1 Leon. 284.

C A P.

C A P. XIII.

Of Recognizances. The Nature of a Recognizance. The Sorts. If a Capias lie on a Recognizance. In what County Scire Facias on a Recognizance ought to be sued. If Debt lies on the Judgment in Scire Facias, as well as on the Recognizance. Who may take Recognizance. Actions on Statutes and Recognizances where to be brought and laid.

Recognizances at the time of the Stat. 32 H. 8. c. 5. were of two Sorts. One usual, Recognizances taken in any of the King's Courts of Record at Westminster; the other in the Nature of a Statute Staple, by the Stat. 32 H. 8. c. 6.

The Conusee of the Statute Staple, in the Stat. 32 H. 8. c. 5. is called Obligee, because in them both the Seal of the Party is put. 2 Inst. 678.

The Nature of a Recognizance in general, how it differs from a Judgment.

Executions upon a Recognizance differ much from a Judgment, for Executions may not be sued upon a Judgment after the Year without a Scire Facias.

Recog-

The Law of Executions.

Recognizance, which is a Judgment by consent may be vacated & *treit hors des Rolls*.

A Recognizance taken in *Chancery* is a thing upon Record in a Court of Record; an Obligation on Record, and a Debt on Record, 2 *Leon*. 88.

A Recognizance is intire, and being discharged in part is discharged in the whole; but if the Defeasance be to be paid in several Sums, there an Acquittance of part is not a Discharge of the residue. 1 *Anderson Case* 355. *Cr. Eliz.* 182. *Coke* versus *Bacon*.

If a Recognizance or Statute be to pay Money at several Days, it is good enough; and if the Conusor fail one Day, the Execution may be sued of the whole Estate. 8 *Rep.* 153. 2 *Inst.* 394, 395.

If three are bound to me in a Statute Merchant, and every of them by themselves, and *quemlibet eorum*; I may sue Execution against one of them, or against all at my Election.

If three jointly bind themselves in a Recognizance, Execution must go against all; and if they are bound severally, there if the *Scire Facias* be against all, the Execution must be so too; for by the Judgment they have made their Election. 2 *Siderf.* 12.

If one acknowledge a Statute, and after a Judgment is had against the Conusor, now against the Conusor the Statute shall

shall be preferred, but not against the Executor. 1 Brownl. 37.

Scire Facias in *Chancery* upon a Recognizance of 200 l. by *Cawley* who was returned Dead: A second *Scire Facias* issued against the Heir of *Cawley*, and against the Tenants of the Lands and Tenements of *Cawley*, which he had *tempore Recognitionis vel postea*, whereupon the Sheriff returns the Defendant *Taunton* Terre-tenant of such Lands, and omitted to return any thing concerning the Heir: Upon this the Defendant pleads, That *Cawley* had nothing in the Lands at the time of the said Recognizance, or ever after; upon this they were at Issue in *Chancery*, and it was sent into the *King's Bench* to be tried, and found *pro Quer. Per Cur'*, The return is not good, because there is no return as to the Heir, and so as to him it is *quasi album breve*, and no return; the Terre-tenant without the Heir is not to be charged, and therefore the Heir ought to be summoned, and until the Heir be summoned, or that it be returned, that there is not any Heir to be summoned, or that the Heir hath not any Lands to be charged, the Terre-tenant ought not to be charged, for the Heir might have a Release to plead, or other matter to bar the Execution. Al- so, if the Heir be within Age the Parol shall Demur; and the Terre-tenant shall have advantage thereof. *Cro. Car.* 295. *Ey-* ries and *Taunton*. But *vide p.* 313. that the return is aided by Statute or *Jeofails*.

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Into what
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cognizance
ought to be
sued.

The first *Scire Facias* to have Execution upon a Recognizance, ought to be in the County where it was acknowledged; but when it is sued there and the Party returned Dead, it may be sued against the Heir, or Terre-tenant in any County where the Party surmifeth he hath Lands. *Cro. Car.* 313.

Notwith-
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Debt lies
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Scire Facias upon a Recognizance, and had Judgment by default *quod habeat Executionem*, and afterward he brought Action of Debt upon the said Judgment, and good; for the Recognizance is a Judgment in it self, and Debt will lie upon it; and it lies as well upon the Judgment as the Recognizance it self, and he need not to proceed in the Judgment given upon the *Scire Facias*. 2 Leon. 14. Lovelesse's Case.

Who may take Recognizances, or before whom they are to be acknowledged.

Note, Recognizances may not be acknowledged before any other Persons, but such as are appointed by the Statutes.

None can take a Recognizance but a Judge of Record.

The Recognizance upon 23 H. 8. c. 6. is in Nature of a Statute Staple, and of the same force, and is always to be acknowledged before the Chief Justice of the King's Bench or Common Pleas (in the Term time) or in their absence out of Term before the
the

the Mayor of the Staple at *Westminster*, and the Recorder of *London*; but it cannot be good except the Seal of the Party be to it; other Recognizances besides those on 23 *H. 8.* may not be acknowledged before any, but such as have power *ex Officio*; as the Judges of the Courts at *Westminster*, or by Special Commission to take them. *Dyer 220.*

All the Judges out of Term may take Recognizances in any part of *England*; and if it be taken before the Chief Justice of the *Common Pleas*, at *Serjeants-Inn* in *Fleet-street* out of Term it is good. *Hob. 195.*

Out of the Comminalty of *London*, there shall be two Merchants chosen and sworn, and before one or both of these Merchants the Recognizances may be taken. *Stat. Ed. 3. 11. 8 R. 2. 4.*

Every Court of Record of any note hath this Authority incident to it, to take Recognizances for all things, which concern the Jurisdiction of the Court, and of all things which arise of, or by reason of the Matters there depending. So it is taken before the Mayor and Aldermen of *London*. 1 *Leon. Case 384. Holinshead and King. 1 Leon. p. 130, 131.*

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Consufors, or by whom Recognizances may be acknowledged.

By Infant,
and how
and when
to be a-
voided.

If an Infant acknowledge a Statute or Recognizance, its voidable by *Audita Querela* during his Minority, but he cannot avoid it after his full Age, neither by *Aud^a Querela*, nor by Writ of Error, because of Infancy only. *Moor* n. 206. *Telo*. 88. *Randale* and *Wale*, 2 *Inst.* 673. And the way to avoid it must be by Inspection, which cannot be after his full Age, 1 *Bulst.* 187, 188. And therefore in *Worsley's Case*, Infant acknowledged a Statute, and was taken in Execution, and at full Age he brought *Aud^a Quer^a* to avoid the Execution. *Per Cur^a*, the *Aud^a Quer^a* shall abate; he shall not avoid it, it being a Matter of Record; but if he will avoid it, it must be during his Minority. *More* n. 196. 1 *Anderson* 25. *Noy* p. 116.

A Recognizance was acknowledged by an Infant, and he was inspected and adjudged to be within Age, and thereupon had a *Scire facias* against the Conusee, and upon a *Nihil* returned it was adjudged the Recognizance should be void, and he to be discharged, whereupon Error was brought, for that there ought to be two *Nibils* returned, for two *Nibils* amount to a Garnishment, and without Garnishment and Oyer of the Party to whom the Recognizance was made, it ought not to be adjudged

judged to be cancelled, and for this Cause it was reversed.

And because the Conusor is at present of full Age, and cannot have a new Writ of *Audita Querela* to be inspected, it was moved that he may have a new Writ comprehending the first Inspection, and the Judgment thereupon, and shew that the first Judgment was only reversed for Error in the Proceedings, and upon all the Matter to be relieved, and so it was done. *Cro. Jac. 59. Yelv. 88.*

Baron and Feme enter into a Statute or By Baron Recognisance, this binds not the Wife, and Feme, albeit she survives her Husband. *10 Rep. 43. 2 Inst. 673.*

Actions on Statutes and Recognizances, where to be brought and laid.

A Recognizance was taken before Chief Justice Hobart at *Serjeant's-Inn, Fleetstreet, London*, out of Term, and an Action of Debt was brought upon it in *London*; the Question was, Whether the Action should be brought in *Middlesex* where the Recognizance was Recorded, or in *London* where it was acknowledged. Now by the Inrollment of the Record it appearing that the Recognizance was taken before Hobart at the Time and Place aforesaid, by which it was a Record *ipso facto* then and there, and the Inrollment is but a Confirmation of the same Record, and makes no change;

but because they both concur to the making of it a perfect Record, the Action may be brought in either County. But by *Hobart* in *London*, as the more worthy Part of the Act; and a *Scire facias* upon such a Recognizance shall be directed to the Sheriff of *London*, and not of *Middlesex*. But if the Entry of the Record were general, that the Recognizance was taken before *Hobart*, it shall be understood in Court, then the Action shall be brought in *Middlesex*. *Hob. Rep.* 195. *Hall and Wingfield.* 2 *Rob. Rep.* 182.

And in *Allen* 12. and 1 *Brownl.* 69. It's good either way in *B. C.* but in *Stiles* fo. 9. in the *King's-Bench* it ought to be where the Recognizance is taken. And in *Wilford's* Case, *Cro. El.* Debt was brought in *B. C.* on a Recognizance in *London*.

Debt Local.

A Recognizance taken by the Custom of *London* makes the Debt Local, 1 *Leon.* 130, 131. and therefore where Debt was brought in *London* upon a Recognizance acknowledged in *Chancery* at *Westminster*, the Writ abated, for the Recognizance makes it Local there.

C A P. XIV.

Scire facias on Recognizance against the Bail: The Nature of it, and how to be brought. Scire facias on a Judgment in B. R. and in B. C. Execution against either Principal or Bail, but not both. In what manner Execution shall or may be taken out joint or several against the Bail. Execution against the Body of the Bail. Recognizance of Mainprise, where it may be taken before the Action brought. In what Court the render of the Body ought to be. Pleadings to Scire facias against the Bail. Return of the Scire facias.

S*Scire facias* must go out against the Bail, otherwise he cannot plead the Release of the Plaintiff, or the Death of the Defendant, in his Discharge, as he may on a *Scire fac'*, the Condition of the Recognizance being to bring in the Defendant if he be condemned, or to pay the Debt. 2 Leon. 30.

After Judgment in B. R. a *Capias* was awarded against the Principal, and returned *non est Inventus*, and afterwards a *Scire facias* was awarded against the Bail, who was returned *Nihil*, and a second *Scire facias* awarded, and he brought in the Principal, and prayed that his Body might be accepted in Execution. It was said of late Times (in favour of the Bail) they used

After the first *Scire facias* awarded, and before the return of it, he may bring in the Principal.

after the first *Scire facias* awarded before the return to allow him the favour to bring in the Principal, but after it is returned, and a second awarded, it was never seen. But *Popbam* said that it might be very well, unless the first be returned warned, and Judgment given thereupon, for the *Scire fac* otherwise would be to little purpose to bring in the Principal: Wherefore the Principal was received. *Cro. Jac.* 109. *Hill and Sandford.*

Scire fac must go out against the Bail.

Scire facias must be against the Bail, else its Error, and no Custom will warrant the contrary; so it was in a Case cited 2 *Leon.* 87. Error was brought upon a Judgment given in *Curia de Woodstock*, which is a Court of Record; and Error was assigned, for that they had awarded Execution without a *Scire facias* first sued out against the Bail, and it was adjudged Error, and the Custom would not maintain it, for the Bail might have a Release or other Matter of discharge to Plead.

Recited in the *Sci fa* that a *Cap* was awarded.

It was an Exception in Justice *Williams* and *Vaughan's* Case taken to the Writ of *Scire facias*, because it was not mentioned therein, that the *Capias* was awarded, yet the Court held it to be good enough, for it is not of Necessity to be recited. *Cro. Jac.* 97.

From what time shall the Principal and Bail be charged,

The Principal shall only be charged from the time of the Judgment, and so shall the Bail. The Presidents upon the Entry of a Judgment against the Bail are *de tempore Recognitionis, secundum formam Recognitionis*, which

which may very well be taken to be from the time of the Judgment rendred. *Cro. Jac.*

449. *Baskervill* and *Brocket*.

Upon a Judgment given in *B. R.* there ought to be 2 *Scire facias*'s, one against the Principal, the other against the Bail; but one only is sufficient in the *Common Pleas*, and 2 *Nibils* returned do amount to a *Scire facias*. *March 3.*

Scire facias against three Bails upon a Recognizance acknowledged by them, and the Principal jointly and severally, and upon Demurrer the Writ abated, because it being founded upon a Record the Plaintiff ought to shew forth the Cause of Variance from the Record, as that one was dead; but if Action be brought upon a Bond in the like Case, there the Defendants ought to shew it was made by them, and others in full Life not named in the Writ, because the Court shall not intend that the Bond was sealed and delivered by all that are named in it, and therefore the Defendant cannot Demurr on it, tho' it be entred in *hæc verba*. So it is if Action be brought upon a Recognizance taken before the Mayor and Recorder, &c. by Statute 23 H. 8. because there the Parties must Seal, and so hath it been adjudged. *Allen 21. Blackwell's Case.*

If one be Arrested on Process in *B. R.* Execution and puts in Bail, and after the Plaintiff recovers, and the Defendant renders not himself according to Law in Safegard of his Bail, the Plaintiff may at his Election

Siire fac'
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ment in
B. R. and
in *B. C.*

Variance
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Record
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either a-
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cipal or
Bail, but
not both.

take out Execution against the Principal or Bail; but if he takes and Arrests the Bail, although he had not full Satisfaction, he shall never afterwards meddle with the Principal: But if two be Bail, although one be in Execution, yet he may also take the other; but if the Principal be in Execution he cannot take the Bail. *Cro. Jac.* 320. *Higgin's Case*, though *Duncomb* and *Cade's Case* was cited to the contrary. p. 28. *Car. 2. B. R. Norris and Oliver.*

After part
of the Exe-
cution is
satisfied,
Plaintiff
may have
Debt for
the residue.

In *Syd. 1. 107. Felgate and Mole's Case.* If Execution be against the Bail in *B. R.* and he pays part, yet the Plaintiff may after take out Execution against the Principal for the residue, the Bail being let at large before the taking of the Principal; and this is the constant Practice of this Court, and *Higgin's Case, Cro. Jac. 320.* is intended where the Bail was in Custody.

In what manner Execution shall or may be taken out joint or several against the Bail.

This point was well debated and adjudged in *Francis Fane's Case*, both in *Syderfin* and *Levins.*

In *Syderfin* the Case is thus,

Debt upon a Judgment of 200*l.* against *B. F. and H.* were his special Bail by Recognizance, as the manner is, by which *F. and H. concesser' & uterque eorum concessit,* that the said Debt and Damages shall be levied upon them, if the Defendant doth
not

not pay or render himself to the Prison of the *Marshalsea*, and after Judgment had against the Defendant, and *Capias* awarded, and *non est Inventus* returned, there was a *Scire facias* against *F. H.* reciting briefly the Judgment on the Recognizance, and upon this a *Nihil* returned, and a second *Scire facias* against them, and the same return, upon which Judgment is entred, that the Plaintiff *Habeat Executionem suam versus F. & H. de debitis & damnis predictis juxta vim formam & effectum Recognitionis predictis*, and afterwards a *Capias* was sued against *F.* only, and upon this a *Testatum Capias* to *Bristol*, and he was taken. *Per Cur.*, the Execution is well awarded against one only, though the *Scire facias* was against both. For a Recognizance is a Judgment upon which, after the Year, there was no other Remedy but Action of Debt; but the Statute of *W. 2. cap. 45.* gives a *Scire facias* in Personal Actions: And this Statute wills, That if Execution be not made within the Year, *Precipiatur Vic' qd' exequi faciet.* And it is not said that after *Scire fac* he shall have Judgment to recover, whereby the Recognizance which is joint or several remains as it was, not altered by the *Scire facias*; and if Debt be brought it ought to be brought upon the first Judgment; and it is not like the Case of an Obligation; for the Lien of the Obligation is altered and changed by the Judgment upon it. *Syd. 339. Gee. versus Sir Francis Fane.*

How Execution ought to be made.

Scire fac on Recognizance.

Judgment on a *Scire fac* upon a Recognizance.

This

The Law of Executions.

This Case in 1 *Levins* 225. is reported thus to the same Effect, but may illustrate the other.

Recognizance of Bail was joint and several, Judgment was had against the Principal, and *Capias ad Satisfac'* sued against him, and returned *non est Inventus*, but not Filed, joint *Scire facias* against the Bail, and on default Judgment, *Qd' le Plaintiff habeat Executionem* against them; upon this the Plaintiff takes a *Ca' sa'* against one of the Bail only, and imprisoned him till he paid the Debt; it was moved for a *Su-perse-deas* and Restitution, *quia erroneè emanavit*. 1. Because the *Capias* against the Principal not being filed, no *Scire facias* ought to Issue out against the Bail. But *per Cur'*, it being sued and returned is insufficient, and may be filed at any time after, and ordered to be Filed now.

Capias against the Principal need not be Filed before *Scire fac'*.

2. The Judgment in the *Scire fac'* being joint, the Execution by the *Capias* ought to be so against both the Bail, and not one only: But *per Cur'*, this is not a Judgment to recover, but *quod habeat Executionem*, and this is to be according to the Recognizance joint or several; but where Judgment is joint, so ought to be the Execution, but the Recognizance out of which this *Scire facias* issues, as out of a Judgment being joint and several, although the *Scire facias* was joint, yet the Execution may be several, as the Record is out of which it issues, for which the Execution was ruled to be good.

Note,

Note, the Bail was bound in a Recognizance that if the Principal be Condemned to bring him in, or that they shall answer the Condemnation, or otherwise the Debt to be Levied *de Terris & Catallis eorum*, as the Course is in B. R. Now although the Recognizance is to be Levied *de Terris & Catallis*, yet Execution by the Body is good by the Law and Usage of the Court.

Execution against the Body of the Bail is good in B. R.

Debt sued by A. against B. who found the Bail, Hobs and another; afterwards B. was Condemned and died, without paying the Condemnation or rendring his Body; a *Scire facias* was sued against Hobs, and upon two *Nibils* returned Execution was awarded against him. Hobs brought his *Audita Querela*, and he was discharged out of Execution. For it is now become impossible by the Act of God that the Principal should render his Body, and there was never any *Capias* awarded against him in his Life time. The Court held it very unreasonable to sue Execution against the Bail till a fault was returned in the Principal; and the Recognizance of the Bail is, That the Principal shall render himself, which is to be intended upon a *Capias* awarded against him. Moor Hobs and Tedcastle.

One seised of Lands in Fee, S. becomes Bail in B. R. in Action of Debt, and after Issue joined Lets the Lands to the Plaintiff; Judgment is after given against the Principal, and an Extent taken upon the said Lease. Lessee brings Ejectment. Q. is, Whether

Where the Land of the Bail shall not be liable to Extent.

In what respect Bail is a Recognizance.

Recognizance Absolute and Conditional.

Whether this Bail be such a Recognizance as the Land is liable to it, and so extendible during the Term; and the better Opinion was, that it shall not. *W. 2. c. 18.* is, no *Elegit* shall issue till *debitum recuperat fuerit*. It was agreed that this Bail to some Intents was a Recognizance, but not such as the Statute *W. 2. c. 8.* requires. There is a Diversity between a Recognizance Absolute, and a Recognizance Conditional: An Absolute Recognizance is of a Sum certain at the time of the Recognizance entring, as in Mainprize, whereby it becomes a Judgment, and the Party enlarged. *Cro. Jac. 449. Baskerville and Brocket.*

Recognizance of a Mainprise, where it may be taken before Action brought; and in what Court the render of the Body ought to be.

R. R. J. W. and W. R. Ter' Mich. 42 Eliz. Et quilibet eorum manuceperunt & quilibet eorum manucepit, viz. W. R. in 120 l. and R. R. and J. W. in 60 l. that the said W. R. within eight Days post monitionem sibi by the Plaintiff or her Attorney given should appear before the Queen's Justices of B. C. by himself or Attorney in Debt of 60 l. to be sued by the Plaintiff against the said W. R. before Octab' Hill next following, and there to Answer; and, if he were Condemned, to satisfy her the said Debt and Damages, or to render himself to the Fleet; which Sum of 60 l. uterque manucaptorum recognovisset, to be levied

vied of his Lands and Chattels, &c. and alledgeth *in facto* that 28 No. 42 Eliz. she brought a Writ of Debt out of Chancery against W. R. returnable in B. C. and that she gave notice to the said W. R. (*tali die & Anno*) W. R. appeared, and she declared in the said Action, & *taliter in eadem Curia process' fuit*, that Judgment was given against W. R. and Cap^r awarded, and he did not render himself to the Fleet, nor pay the Condemnation *unde actio accrevit*, and came to issue about the Notice, and found *pro quer'*.

It was moved in Arrest of Judgment.

1. That this Mainprise or Recognisance was not well taken to have a Mainprise before an Action brought: But *per Curiam*, It is the Course to take such Recognizance where the Cause is removed by *Hab' Corpus*, and the King's Bench ought to take notice and Conusance of B. C. 2. Because it is not alledged this Cause is removed by Writ of Error, and it is not averred whether it were reversed or affirmed, *sed non allocatur*, for it is but Inducement to the Action. *Et non refert*, how it came hither, *viz.* by Removal *Mittimus*, or out of the Chancery (which is of Causes, the usual and best Course) or otherwise, ^{how.} for being here it sufficeth to draw an Action upon. 3. Because it is not alledged In what he did not render himself to the Fleet, Court the whereas it ought to have been to the *Marshalsea*, the Record being in B. R. *Sed non* the Body *alloc'*, for the rendring ought to be where ^{ought to be.} the Judgment is. Plaintiff had Judgment.

ment. Cro. Jac. 97. Elix. Hargrave versus Rogers.

What Pleas may be pleaded to Scire facias against the Bail, and what not.

That the Cause was removed by Hab' Corpus.

Scire facias brought for that the Principal did not render his Body after Judgment nor pay the Condemnation. Defendant pleaded that after the first Action brought, and Bail found the Cause was removed by *Habeas Corpus*, and Bail accepted in *B. R.* and afterwards the Cause was remanded by *Procedendo*, and then Judgment was given against the Principal. *Per Cur'*, by removal of the Cause the old Bail is not discharged; for when the Cause is remanded by *Procedendo*, it is as if it never had been removed, and there is no Record of the removal thereof. But if it be removed in *B. R.* and Bail filed there, and afterwards in another Term it is remanded, it is otherwise, for there the Court is possess'd of the Cause, and so remained for a Term, and a Record is made thereof. Otherwise had it been remanded the same Term it was removed. Cro. Jac. 363. Beeson and Buller.

Difference between the Cause being remanded the same Term, or another Term.

Payment

Payment pleaded.

Scire facias upon a Judgment had against the Principal for 35*l.* The Defendant (the Bail) pleads, that the Principal after the Judgment paid to the Plaintiff 34*l.* in Satisfaction of the Debt due upon the Judgment, which he accepted. Plaintiff Demurs, and Judgment was given for him. For tho' the Bail may plead Payment to the Plaintiff in regard of the Condition of his Recognizance, which is to pay the Condemnation, or to render his Body, yet the Bail may not Plead a less Sum in Satisfaction after the Money became due. *Pennell's Case*, 5 Rep. 2 *Levins. Holmes versus the Manucaptor's of Browne*. And so is *Orton and Olson's Case*, Mich. 16 Car. 1. B. R. 1 Roll Abr. Tit. Bail. The Bail cannot Plead the Principal paid to the Plaintiff 80*l.* in Satisfaction of a Judgment which was an 100*l.* and upon this the Plaintiff acquitted and discharged the Principal of the Judgment for 80*l.* which cannot be in Satisfaction of 100*l.* and also it is pleaded without Deed or Matter of Record.

The Bail may plead payment to the Plaintiff.

If a Man hath Judgment in Debt in B. Where and the Defendant is taken in Execution, Payment who brings Error, and his Body is removed by the Principal into B. R. by *Hab' Corpus*, and there bailed, and the Bail is bound in a Recognizance that the Principal shall prosecute the Writ of Error, *cum effectu*, and if Judgment be charged.

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be affirmed, that he shall pay the Sum recovered ; and after the Plaintiff in the Writ of Error pays the Sum recovered, and after the Judgment is affirmed : In a *Scire facias* against the Bail they may not plead this Payment by the Principal in discharge of themselves, for this payment doth not discharge the Principal himself.

It was doubted in *Cokein* and *Proctor's* Case, in a *Scire fac'* against the Bail upon a Recognizance, whether the Bail may plead the Principal was taken in Execution by the Sheriff upon the *Cap' ad Sat'*, and upon that paid the Money. 1 *Roll Abr.* 335.

Death of the Principal.

Scire fac' against the Bail ; the *Scire fac'* recited, That Judgment was given against the Principal in Debt, and that he had not paid the Condemnation, nor rendred himself to the *Marshalsea* according to the Bail ; the Defendant pleads that the Principal was dead before the *Scire facias* brought. Plaintiff Demurrs, because he alledged not when he died, nor that he died before the *Capias* awarded against him. *Per Cur'*, The Plea for this Cause is ill. *Cro. Jac.* 97.

Release.

Release.

If *B.* is Arrested at the Suit of *A.* and this is returned in *B.* where *B.* and *C.* as his Bail become bound in a Recognizance (*viz.*) *B.* in 200 *l.* being the Principal, and *C.* the Bail in 100 *l.* that *B.* shall appear to the Action, &c. according to the usual Form, and after Judgment is given against *B.* and *C.* their several Recognizances, who plead the Release of *A.* to *B.* the Principal, of all Debts, Dues, Judgments, Executions and Demands. This is a good Plea as well for *B.* the Principal, as *C.* the Bail, and the Bail may plead Satisfaction of a Judgment, and the Release is a Satisfaction. 21 Car. 1. *B.R. Bancroft and Willet.*

In a *Scire facias* against the Bail he pleaded that the Plaintiff had Arrested the Party, who was Condemned in Execution in the Stannary Court, so as he could not render his Body; adjudged no Plea, because he might remove his Body with a *Corpus cum causa*, and so bring him into this Court. *Moor. Marshall and Vincent's Case.*

The Plaintiff had taken one of the Principals in Execution.

The Plaintiff recovered against two in Trover, and now brought a *Scire facias* against

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against the Bail, who pleaded that he had taken one of the Principals in Execution before the *Scire facias* taken out. 1 Roll's 897. But

If one hath Execution against the Principal, he cannot afterwards proceed against the Bail, nor, *é contra*. But by 28 Car. 2. it was resolved in the Case of *Orlbary* and *Norris*, where the Bail was taken first in Execution, and afterwards the Principal, they should both be detained until Satisfaction, contrary to *Rolls* 897. So that it appears that the Plaintiff shall not be concluded by his Election to proceed against the one first; but here the difficulty is, that the Bail by the Plaintiff's Act is disabled to bring in both their Bodies according to the Condition of the Recognizance, he having taken one of them himself. *Et adjorn*. 1 Vent. 315.

Scire facias against the Defendant as Bail for *A. B. C.* and *D.* The Defendant pleads that before the return of the second *Scire fac* the Plaintiff had taken *A.* by *Capias*, and still holds him in Execution. Plaintiff Demurs. *Per Cur'*, it's an ill Plea. The Bail have taken upon them to bring in all the four; then though the Plaintiff hath taken one, this shall not discharge the Bail from bringing in the other three, for he ought to bring in all the four, and gave Rule for Judgment for the Plaintiff, *nisi, &c.* At which Day Attorney General *Jones* presses to be heard further in this Case. For he said that the Plaintiff by taking one of the Prin-

Principals had determined his Election to have the Bail in Execution, and by this had discharged the Bail, and cited 1 Roll Abr. 287. Letter G. 2 Levins 195. Astry and Ballard.

Of the Pleading Reddidit se.

Note, The Pleading *Reddidit se* may be pleaded well enough without averring *prout patet*, for it is only filed with the Bail-piece entred into at the Judges Chamber, upon which the Secondary writes a *Reddidit se*, and so the Party goes to the Marshal into Custody, and thence returns to the Secondary, and he enters *Commititur in Exoneratione Manucaptorum*; and if this render be before the return of the second *Scire Fac'* on the Bails Recognizance, it may be well enough pleaded, *prout patet*, &c. and this is the Course of the Court.

In *Scire fac'* against the Bail he pleaded that the Principal *Reddidit se*: Adjudged it shall be Tried by the Record, and not by the Country. And if the Party render himself at the Bar, and the Attorney of the Plaintiff is not there to pray him to be Committed, he shall be Committed, *ex officio*, by the Court. *Wolley and Davenant's Case. More.*

Return of a Scire facias against the Bail.

Return at
a Day cer-
tain, or
not.

Scire facias on a single Recognizance of Bail being returned at a Day certain, it was excepted to, because it ought to be on the common Return Day generally, which the Court agreed. But where there is a Condition, it may be returnable at a Day certain, and so are the Presidents. This *Scire fac'* is grounded upon a new Foundation; but if it were a *Scire fac'* to revive a Judgment, it may be at a Day certain. And the *Scire facias* was quash'd, this being the Course of the Court, and the Party left to a new *Scire facias*, or Debt, upon the Recognizance. *Allen* against the Manu-
captors of *Cutler*.

Restitution.

The Bail moved for Restitution of Money levied upon them in *London*, after a render in Execution of the Principal, the Attorney having been paid 10 s. to enter a *Reddidit se*, but omitted it. The Court agreed, that after a Render the Plaintiff hath three Terms to charge him in Execution, or to take a *Fieri facias* against his Goods; but before his Election, the Bail are Discharged by the Render. And, *per Curiam*, the Money was restored,
and

and the Attorney ordered to Enter a *Red-
didit se.*

Cap' ad Satisfac' lies on an Original Re-
cognizance by Bail, to prosecute a Writ
of Error, which is of a Sum certain.
1 *Reb.* 456.

R 3

G A P.

C A P. XV.

The Process in Recognizance. Of Execution upon a Statute Merchant, or on a Recognizance per Statute 23 H. 8. c. 6. Of Execution upon a Statute Staple, 23 H. 6. c. 26. Explained. The Proceedings in a Statute Merchant, Staple, and Recognizance, on Statute 26 H. 6. The difference of Proceedings upon the Statute Staple, and the Recognizance founded upon Stat. 23 H. 8. and the Statute Merchant. The Levary, what it is. The Sum apportioned, and several Executions into several Counties. What Things may be taken in Execution on a Statute Staple, Merchant or Recognizance within the Statute 23 H. 8. c. 6. Declarations and Pleadings on Statutes and Recognizances. Of Extenders extending too high, and the Statute of 2 H. 4. c. 17. Explained, and of Acton Burnell. Of Contribution. In what Cases the Heir shall only be charged, and where he shall have Contribution. Where the Purchaser shall have Contribution.

P R O C E S S.

ON a Recognizance in Chancery, the Process is *Scire fac'*, and this being returned with a *Nihil*, another *Scire fa'*, which being so returned also, he shall have Judgment; and then he may have (amongst other Processes) a *Levry fac'* for the Goods, but

but not a *Capias* for the Body. 8 Rep. 141.
Ognel and Paston's Case. 2 Leon.

It was argued in Ognel and Paston's Case, Whether a *Capias* lay upon a Recognizance in *Chancery*. It was said, where no *Capias* is on the Original, there is no *Capias* in the Execution, therefore not on a Recognizance. The Case was, the Plaintiff sues two *Scire fac'*, whereupon two *Nibils* were returned; and after a *Levari fac'* upon that also a *Nihil* is returned; then issues a *Cap' ad Satisfaciend'*. Now a *Capias* on a Recognizance is not by the Statute of 25 Ed. 3. but by the Common Law. And per *Manwood*, I do admit the Rule, where there is Reg. no *Cap' ad respondend'*, there is no *Cap' ad Satisfaciend'*: But that ought to be intended in Cases where is an Original and Mesne Process before Judgment. I will put a good Rule: It is a Debt upon Record, and therefore a *Capias* lies, as in Case of Special Bail upon a *Latitat*, who is bound in a Recognizance; the Defendant is Condemned and cannot be found, a *Scire facias* issues against the Sureties, and then a *Capias*. 2 Leon. 88. Vide Cro. Jac. 3. Weaver and Clifford. And in Grimston and Wade's Case. 3 Keb. 229. the Court conceived no *Capias* lay on Recognizance in *Chancery*. But if the Party be taken on such *Capias*, it's sufficient for Escape against the Sheriff. Co. 8 Rep. 142. By the Law the Body of the Recognizor is not liable to Execution.

Judgment being entred in *Scire facias* on Debt on Recognizance, Debt lieth thereon, or up- Judgment in *Sci' fa'*.
on

on the Recognizance alone, but not pending the *Scire fac'*. Per Hale. 3 Keb. 221. In *Grimston's Case*.

Conussee,
or Recognizance, to
have the
Moiety of
the Lands.

The Conussee shall have the same Things in Execution as a Man shall have after Judgment by *Fieri fac'*, or *Levari fac'*, all his Goods and Chattels; and by *Elegit* the moiety of his Lands, except *Bobus & Afris caruæ*, &c. but in this Case he cannot take the Body of the Conusor in Execution, unless it be upon a new Statute, as in case of Bail in *B. R.* 3 Rep. 12. *Plow.* 72. *Dyer* 306.

Proceedings upon
meer Recognizances
are otherwise than
upon Stat.

The Proceedings upon meer Recognizances are of another manner than upon Statute Merchant, Staple, or Recognizance within the Statute of 23 H. 8. as by *Scire facias* against the Conusor; or, if he be dead, against the Heir when he is of full Age; or against the Purchasers if the Lands which the Conusor had at the time of the Recognizance be sold, to warn them to come into Court, whence the same *Scire facias* issued, to shew Cause why Execution should not be made upon the said Recognizance; and if the Party or Parties cannot be found to be warned, or being warned do not appear at the time, or appearing do not shew Cause why the Debt should not be levied, the Conussee shall have Execution of a Moiety of his Land by *Elegit* (if it be a Recognizance at Common Law) or of all his Goods (if he be living) by *Levari* or *Fieri facias* at his Election. But he may not have Execution of his

his Body, unless he bring Action of Debt upon the Recognizance.

Note, In a *Scire fac'* on a Recognizance Joint-tenancy shall abate the Writ. *More* § 14.

Scire facias in *B. R.* on a Recognizance *Scire fac'* may not be general without shewing the on the Re- time of the Recognizance, and other Par- cognizance ticulars, for it is but a Pocket Record, there- must be fore it is to shew what Date it is, for other- particular. wise the Party may not know what matter to plead; and perhaps it is Released or Cancelled, and a Man may not plead Release after *Nul tiel Record*. *Q. 2 Syd.* 156, 159. *Alston and Body*.

On Recognizance the Plaintiff hath Election to take out a *Capias* on *Elegit*, or a *Scire facias*; and if the Lien be real, he must join all: For though he may take out a *Capias* upon it against the Survivor, yet he may take out a *Scire facias* against all.

Execution upon a Statute Merchant, or on a Recognizance, by Stat. 23 H. 6 c. 6.

It is first to take the Body of the Debtor, if he be a Lay Person and can be found, if not then upon his Lands and Goods, by *Stat. de Mercatoribus*.

And the Execution upon a Recognizance within the Statute of 23 H. 8. c. 6. and the Proceedings upon it are the same with the Statute Merchant, except as *infra*.

Now

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How the
Land on a
Statute be-
come char-
ged with
the Debt.

Now Mr. *Plowd.* in his *Com.* 72. saith,
That when a Man enters into a Statute or
Recognizance, upon this Statute the Land
of the Conusor is not the Debtor, but his
Body ; and the Land is only liable in re-
spect that it is in the Hands of the Conusor
at the time of the acknowledging of the
Statute or afterwards ; and the Land is not
charged with the Debt, but chargeable
only at the Election of the Conusee. And
though the Conusor alien his Land to an-
other, yet the Conusor remains Debtor
still, and his Body and Goods shall be taken
in Execution ; and yet when Execution
is Sued upon the Land, the Land is char-
ged and becomes Debtor also.

Diversity
between
Process on
Stat. Mer-
chant and
a Statute
Staple, as
to Execu-
tors.

New Cer-
tificate.

If a Testator upon a Statute Merchant
procures it to be certified into the *Chancery*,
and a *Capias* thereupon returnable into
B. R. or *B. C.* as is usual, and the Conusor
is returned *non est Inventus*, and after the
Conusee makes his Executor, and dies be-
fore Execution made by *Extendi fac'*, his
Executor may not prosecute this *Extendi
fac'*, but must have a new Certificate out
of *Chancery*, and a new *Capias*. *Cro. Car.*
326. But upon a Statute Staple, or a Sta-
tute upon the 23 *H. 8.* a Certificate being
made and delivered into the Hands of the
Clerk of the Crown in *Chancery*, then by
Warrant of the Lord Chancellor he shall
have an *Extendi facias* thereupon ; and this
being extended and returned, is delivered
into the Petty-Bag. And though he who
procured it be dead, yet being all in one
Court,

Court, and appearing one Record, it is not the Course to have a new Certificate or Extent, but the Executor or Administrator upon his Oath in *Chancery*, and shewing the Testament, or Letters of Administration, shall have a *Liberate*, and not be put to a new Certificate and a new Extent, because it is in one Court. *Cro. Car.* 326.

Execution upon a Statute Staple.

Execution upon a Statute Staple is to have the Body, Lands and Goods of the Debtor, and this is founded on 27 *Ed. 3.* What it extends to. c. 9. and this is referred to a Statute Merchant, and what will be liable to Execution upon a Statute Merchant, will be liable to Execution upon a Statute Staple.

By this Statute the Mayor of the Staple shall keep the Debtor's Body in Prison if he be found within the Staple until the Party be satisfied his Debt and Damages; but if he be out of the Jurisdiction it shall be certified in *Chancery* under the Seal of the Mayor, upon which a Writ shall issue to take the Body, Lands and Goods, and upon that Execution shall be as in a Statute-Merchant, and that is with Costs and Damages. And where the Defendant hath a *Scire Facias* in *Chancery* to have back his Land, the Conusee shall say he hath not levied his Costs and Damages, and then the Chancellor is to set down what Costs and Damages he shall have. 15 *H. 7.* 16. How the Body shall be subject. Levying of Costs and Damages.

To

The Law of Executions.

King's
Seal.

To the Statute Merchant there is the Seal of the King and the Party, but the Statute Staple has not the King's Seal; but if it be grounded upon the new Statute of 32 H. 8. it hath also the Seal of the Party.

Without a
Scire Fac'
by Execu-
tor.

It hath been held, that an Executor may sue Execution of a Statute Staple or Merchant without a *Scire Facias*, which he may not do of a Record at the Common Law.

*Where and in what Cases and upon what sort
of Recognizances Debt lies.*

No Debt
by Latitat
pending
the Sci'fa.

Grimston, Master of the Rolls, having Judgment, *Quod habeat Executionem*, in *Scire Facias* on Recognizance in the Petty Bag, brought Debt by *Latitat* in B. R. *Per Cur'*, no Debt on *Latitat* lies pendant the *Scire Facias*, that being an Election to Sue so; but after Judgment entred Debt lies thereon, or upon the Recognizance alone, but not pending the *Scire Facias*. The Court doubted if *Capias* lies on a Recognizance in Chancery, and, I think, it is still controverted. 3 Keb. 221. *Grimston* and *Wade*.

Vide supra Recognizance, Tit' Process.

The

The Proceedings upon a Statute Staple, Merchant and Recognizance within the Statute of 23 H. 8.

• They are in their Nature as Judgments, and the Proceedings thereupon are like those on a Judgment.

The Conusee on a Statute Merchant ^{Action of} may, if he please, bring an Action of Debt ^{Debt upon} upon the Statute, and waive other Pro- ^{the Statute,} ceeding. Or he may (or his Executor if he be dead) may have present Execution ^{or present} upon it after this manner. If it be a Sta- ^{Execution,} tute Merchant or Staple, or on 23 H. 6. ^{and how.} he may bring his Statute to the Mayor, Clerk or other Officer before whom it was acknowledged, and there they will find the Record of it, and the Day it passed for the payment of the Money, they are to Apprehend and Imprison the Body of the Conusor, if he be Lay and can be found within their Jurisdiction; if he can't be found there, they are to certify the Record into *Chancery* (which if they refuse to do, they may be compelled to it by a Cer- ^{Certiorari.} *tiorari*) and upon a *Nihil* returned upon a *Testatum est*, he may have Process in another County. *Aliter* of Goods. And if Execution be not done upon it by reason of the Death of the Conusee or otherwise, the Conusee or his Executor or Administrator may have another *Certificate*, and thereupon, in case of a Statute Merchant, he

he shall have a Writ of *Capias* out of the *Chancery*, directed to the Sheriff of the County where the Conusor lives, to Apprehend and Imprison him, and this is to be returned into the *Common Pleas* or *King's Bench*. And when he is taken, he shall have time for a quarter of a Year to make his Agreement with the Conusee, and to sell his Lands or Goods himself to satisfy him; and the Sale thereof, though he be in Prison, shall be good. But if in that time he doth not satisfy the Conusor, or if upon the *Capias* the Sheriff return *non est Inventus*, then by another Writ, or divers Writs (if the Lands or Goods lie in divers Counties) called *Extendi facias*, the Sheriff shall be commanded to extend his Lands, and to deliver the Goods to him and the Lands to hold to him and his Heirs till the Debt be levied or paid.

And in the Case of a Statute Staple presently after the Certificate into the *Chancery*, the Conusee shall have a Writ to take his Body, and extend all his Lands and Goods retornable in *Chancery*, that he had at the time of the Statute entered into or after. And this Writ is a Commission directed to the Sheriff of the County where the Lands and Goods lie, for the valuing of the same, whereby they shall be Appraised and Valued at a reasonable Rate by Inquisition. And this Inquisition so taken is to be returned by the Sheriff, and thereupon the Lands, Goods and Chattels are to be taken by the Sheriff into his Hands;

Hands, and by him to be delivered by the Conusee, which the Sheriff, if he will, may do without Writ, to hold to the Conusee till he be satisfied his Debt and Damages: And if the Sheriff refuse to do it, the Conusee shall have a Writ out of the Chancery called a *Liberate*, to compel him to do it, and to deliver to the Conusee the Lands and Goods so found by Inquisition, and taken into his Hands upon the Extent, and the Conusee may enter upon the Lands himself. If the Lands or Goods are overvalued, the Conusee must move the Court where the Writ is returnable at the Return Day, or at least the same Term when it is returnable, that the Appraisors may take Lands or Goods at the Rate they have valued them, in the same manner as the Conusee is to have them. *Golsb. 1. 39.* But note, if the Conusee accept of the Lands and Goods of the Sheriff, or suffer the Term to pass where the Writ is returnable, he is too late, and hath no Remedy at all. But if the Appraisers undervalue the Goods in favour of the Conusee, the Conusor hath no remedy; for he may at any time pay all or the residue of the Debt and Damages unlevied, and have his Land again, yet the Body of the Debtor is to remain in Prison till the Debt be paid.

If the Sheriff will deliver but part of the Land of the Conusor, the Party may refuse the Land; for if he should accept of that, he shall be concluded to demand the whole afterwards. *20 Ed. 3. Exec. 84.*

Difference

Difference of Proceedings on Statute Staple and Recognizance, and Statute Merchant.

Note, So you may observe the differences only between proceeding upon the Statute Staple and the Recognizance founded upon the Statute of 23 H. 8. and the Statute Merchant. *As,*

1. Upon the Execution of the Statute Merchant there doth issue forth a *Capias* against the Body, before any Execution be to be made of the Lands and Goods, and the Lands and Goods cannot be extended till a Quarter of a Year be past after the Body taken, or the Sheriff hath returned a *non est Inventus*. But upon the Execution of the Statute Staple and the Recognizance, the Body, Goods and Lands may be taken together at the first. This therefore is a more speedy Remedy than the former.

2. Upon the Statute Merchant one may have an Action of Debt, otherwise it is upon a Statute Staple.

3. The *Capias* on the Statute Merchant may be returnable into *B. R.* or *B. C.* but the Writ of Execution on the other is to be returnable into *Chancery*.

4. In a Statute Staple, presently after the Certificate into the *Chancery*, the Comisee shall have a Writ to take his Body, and extend his Lands and Goods returnable in *Chancery*, which is a Commission directed

directed to the Sheriff, *prout supra*, all in one Writ.

5. The Tenant by *Elegit* upon Judgments and Recognizances is to hold the Land until he be answered the Debt without his Costs and Charges, &c. but the Tenant by Statute Merchant, Statute Staple, or by Recognizance in nature of a Statute Staple is to hold the Land, &c. until he be paid the Debt together with his Charges and Costs. 1 *Inst.* 678.

Note, Upon a Statute Staple or Recognizance in nature of it, the Writ of Execution upon the return of the Death of the Conusor is, to extend the Land *nec non* *Cattalla*, which were the Conusor's at the time of his Death. 21 *June*, 8 *Car.* 1. *Wigmore's* Case, and not to extend the Land and Goods of the Conusor at the time of the Debt acknowledged.

Vide the Form of the Writ of Execution upon a Statute Merchant, *vid.* 2 *Roll Abr.* 475.

Vide the Form of the Writ of Execution upon a Statute Staple, and a Recognizance in nature of it, *vid.* 2 *Roll Abr.* 475.

So that by force of the Writ upon the Statute Merchant the Sheriff may deliver the Land and Goods upon the Extent to the Party; but by the Writ on Statute Staple or Recognizance in nature of it, he is to extend the Land and Goods, and to

Upon what Execution the Sheriff may deliver the Lands and Goods to the Party.

S

seize

seize them into the King's Hand, but not to deliver them to the Party without a *Liberate*. 2 Roll Abr. 475.

Scire facias on a Recognizance before the Chief Justice; Plaintiff pleads in Abatement, that there were but 14 Days between the *Teste* and Return of the *Scire fac'*, but resolved that this was good by Stat. 17 Car. 1. Cap. 6. Par. 8.

L E V A R I.

The *Levari fac'* is to levy the Money upon the Profits of the Lands and Tenements, and upon the Goods of him that hath forfeited a Recognizance; and this must be sued within, and may not be sued after the Year is past after the Day of payment of the Money upon a Recognizance or after a Judgment, but there must go forth first a *Scire fac'* to the Defendant, to shew cause why Execution should not be done: And in this Case the Land may not upon this Writ be seised and delivered to to Party as upon an *Elegit*.

Sicut alias
Levari to
Levy the
residue.

If the Sheriff upon this Writ return that he hath seised part of the Money, which he hath delivered to the Party; now upon this Return the Party which ought to have the Money may have a *Sicut alias Levari fac'* to the Sheriff, to levy the residue thereof. *Plow.* 441. *Fitz.* 265.

Note, He that sueth forth a *Scire fac'* in *Chancery* to defeat an Execution upon a Statute

rate Staple, shall find Surety to prosecute with effect.

In Issue out of *Chancery* on payment by *B.* the Father or his Son, under whom the Plaintiff claimed by a Statute entred into by *B.* the Father, in regard that the Defendant is Executor of an Executor; and so in *Chancery* his Oath cannot be had whether it were paid or not, as they might have had against the Executor or Administrator. It appeared that a *Capias si Laicus* issued out *Process.* of *Chancery* on a Certificate there by the Mayor of *Sudbury*, before whom the Statute was acknowledged, upon Return whereof in *B. C.* as it must be, and Filed with the *Custos breviarum*. On Statute Merchant Writs of Extent were signed by *Brownlow*, Prothonotary, on view of the Statute, without sight of the Writ of *Capias*; after which, on 5 *H. 4. c. 12.* the Statute need not be shewed, but that is sufficient Prosecution; and Verdict for the Defendant, tho' it appear'd not the Extent was Sealed. 3 *Keb. 358.* *Willoughby's Case.*

The Sum apportioned, and several Executions in several Counties.

If a Statute Merchant be acknowledged of 100 *l.* the Conusee may apportion the said Sum, and have Execution in one County for 20 *l.* and for 20 *l.* in another County, and so several Executions in several Counties for Body, Goods and Lands;

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according to his Apportionment ; if he is returned dead, then Execution for Lands and Goods ; but when he is returned *non est Inventus*, then for Body, Lands and Goods.

Note, Per Stat. 5 H. 4. c. 12. it is Enacted, That when a Statute Merchant is certified into *Chancery*, and upon this a Writ is awarded to the Sheriff, and this returned in *B.* and the Statute there once shewed, although that Process after such shewing be discontinued, &c. that the Justices of the Bench where the Statute was once shewed, may upon the same Record make an award and full Execution of the said Statute, without having any shewing of it at any time after.

A Statute Merchant was by *Mittimus* removed out of the Chancery in *B. C.* and Execution was awarded there, *Super tenorem Recordi.* Resolved, 1. That Error lies in *B. R.* tho' the Original be in the Chancery and the Execution in *B. C.* 2. That in that Case the Conusor cannot alledge for Error that the Statute wants one of the Seals that ought to be to it, because he hath admitted the same in *B. C.* *Moor.*

Worsly and Charnock.

What

What Things may be taken in Execution on a Statute Staple, or on a Statute Merchant, or on a Recognizance within the Statute of 23 H. 8. c. 6. Vide supra, What Things are extendible.

Execution on a Statute Staple, Merchant, and on a Recognizance within the Stat. 23 H. 8. is to have Body, Lands and Goods; and the Body of the Conusor (tho' there are Lands, Goods and Chattels) is liable to Execution, but not the Body of his Heir.

Not only such Lands, &c. as the Conusor hath at the time of the Execution of the Statute or Recognizance, but such as he had at the time of his Entry into the Statute or Recognizance, into what Hands soever they are since come, will be subject to the Execution. It must be Fee-simple Lands.

Entailed Lands of the Conusor are liable to Execution for the Life of Tenant in Tail. But if he, after he enters into a Statute, suffer a Recovery of the Land, then it shall be subject to Execution. *Cro. Jac. 85.*

If the Conusor hath Lands as Joint-tenant, the Moiety will be subject to the Execution during the Life of the Conusor. And if the Conusor survive his Companion, all the Land will be liable: For if one of two Joint-tenants in Fee be indebted to the King upon Record, and he die, the Survivor shall hold the Land discharged, *a fortiori*, in case of a Subject.

One Conusor is Joint-tenant.

Rents.

Rents also as well as Lands are liable to this Execution. One makes a Feoffment in Fee or Lease for Life, reserving Rent, this Rent is extendible, and the Conusee may distrain for it. So if Lessee for Life makes a Lease for Years, rendering Rent, and then he enters into a Statute.

Where and
in what
Case Rent
is liable to
Execution,
or not.

If the Conusee hath a Rent-charge in Fee, for Life or Years, this will be extendible as Land. *More 32. Case 104.* And though afterwards the Rent become extinct by the Purchase of the Conusor or otherwise, yet as to the Conusee and this Execution it shall be said to continue and be in *esse*, and so subject to the Execution. But if the Conusor, before the Extent, purchase parcel of the Land, the Rent is gone, and will not be liable to the Execution. If a Rent be granted to one for Life after the Death of his Wife, and after he acknowledgeth a Statute, and after his Wife dies, and afterwards he releaseth the Rent to the Terretenant, this Rent will be liable to Execution. *7 Rep. 38. Dyer 205.*

Release.

Rentseck.

The Sheriff in *Welsack* and *Heatbe's Case* delivered the Rent without the Land, being a Rentseck, and a bare Rent cannot be delivered *ut liberum tenementum*. *Cro. 3. 656.*

2 of Tithes, *Stiles 168, 169.*

Offices.

Offices of Trust, as Stewardships of Courts, and other Offices for Administration of Justice, Keepers of Parks, &c. are not liable to Execution. *Dyer 7.*

A Right or Title to Land only is not liable to Execution. If one be disseised of Land, and then enter into a Statute, the Land will not be liable to Execution ; but if the Conusor shall after regain the Possession of his Land by Entry or Action, it will then be liable to Execution. *2 Rep.*

Right or
Title to
Land.

39.

So shall Reversions or Remainders be liable to Execution when they come into Possession.

Reversions,
Remain-
ders.

If one seised of Land in Fee makes a Lease for Life, and after enters into a Recognizance, and then Grants the Reversion to another with Attornment of the Tenant, and dies, the Grantee enters, the Land shall be chargeable in Execution. *Dyer 7. 373. 1 Inst. 374. More, Case 118, 128.*

Reversion
granted.

But a Remainder in Tail, or a Remainder in Fee after an Estate Tail in Possession, will not be liable to Execution till it come into Possession.

If the Conusor of a Statute have a Reversion, and grants it over, and after the Tenant for Life dies, it shall not be liable to the Execution ; for it was never extendable in the Hands of the Conusor : But if he had not granted it away, it would have been extendable when it fell in Possession. *More, Case 118.*

Conusor of
a Statute
grants the
Reversion.

Note, In the Case of a Statute, Recognizance or Judgment, the Heir is charged as Terretenant, and not as Heir ; because that by the Statute o Recognizance the

How the
Heir is
charged.

The Law of Executions.

Heir is not bound, but the Conusor *concedit quod dist' pecunie summa de terris Levetur.*
3 Rep. 12. b.

Lands chargeable to this Execution, which other Lands descend to an Heir, they shall none of them be taken in Execution till the full Age of the Infant. *Jenk. Case 59.* For some may not be charged till they are all chargeable. So if the Lessee for Life or Years of the Conusor hath part of the Lands liable, and the Heir within Age, the residue, all must stay till the Heir be of Age.

Dower of the Wife that was married after the Statute acknowledged, shall be extended during the Nonage of the Heir. But if a Title of Dower or Lease go before the Statute or Recognizance, this will not be liable at all. *Idem ibid.*

If a Man seised of a Rent-charge be bound in a Statute, and Execution be sued upon it, the Rent shall be extended, and yet the Statute *de Mercatoribus* speaks only of the Goods and Lands of the Debter, or does not speak of the Tenements or other Things. *More Rep.*

What Goods and Chattels liable to Execution on Statute, or not.

The Goods and Chattels which the Conusor has in Right of his Wife are liable, but not such Goods as the Wife has as Executrix to another.

The

The Goods of the Conusor which he has ^{Goods en} as Executor, are not liable, because he has ^{auter droit.} them in *auter droit*.

The Corn sowed by the Conusor on the Corn sowed Land after the Statute entred into, and ^{ed.} before the Extent, will be liable to Execution.

Goods which the Conusor has pawned, ^{Goods} while they continue so, are not liable to ^{pawned.} Execution.

The Goods that he hath of another Man's ^{Goods} only in his Custody, are not liable; but ^{bailed.} if the Conusor deliver Goods of his own to another to deliver to J. S. these Goods, until they be delivered over, will be liable to Execution.

Goods which the Conusor has in nature of a Distress, as for Damage fesant, ^{Goods di-} for Rent or Amercement which are in ^{strained,} *Custodia Legis* while they be so, and Things ^{and in Cu-} in Action are not liable to this Execu- ^{stodia Legis} tion.

But these Goods of the Conusor which are liable to Execution, must not be such as he had at the time of his Entry into the Statute or Recognizance, but such as he had at the time of the Execution awarded.

3 Rep. 12.

Declarations and Pleadings on Statutes and Recognizances.

Declaration is, that the Defendant *per scriptum suum obligatorium, &c. concessit se teneri, &c. solvend cum requisitus esset.* The Defendant demands Oyer of the Obligation which is of a Statute Merchant, *&c. solvend* at the Feast of, *&c.* It is an incurable Fault. *Cro. Fac. 316. Fox and Jukes.*

Debt upon a Bond of 300*l.* It appeared it was a Statute Staple of 300*l.* acknowledged by the Defendant and two others before the Mayor of *Lincoln*, but because the Seal of *Lincoln*, annexed thereto, was not of two pieces, according to *Atton Burnell*, it's void as a Statute, but good as an Obligation. *Cro. El. 355. Hollingworth and Ascue.*

It is no good Plea to say that such a one was bound in a Recognizance, and not to say *per scriptum suum obligatorium*, and to conclude it was done *secundum formam Statuti*, doth not help it. But in a Verdict it was agreed to be good. *March 76. Harris and Garret. 4 Rep. 65. Fulwood's Case* If the Jury find a Recognizance before the Mayor and Recorder, though they say not *per scriptum obligatorium*, or *secundum formam Statuti*, it's good enough.

Defendant Pleads to Debt on two Bonds, that the Intestate was indebted to the Plaintiff in a Statute Merchant of 250*l.*

250 l. which Statute is yet in force, &c. Diversity between a Plea and a special Verdict.
 and that she hath not above 40 s. Assets *ultra*. Plaintiff replies, that the Statute is burnt with Fire. Judgment *pro Quer* on Demurrer. For by the Demurrer the Defendant hath confessed the burning of the Statute, and then it can never rise up. For the Statute 23 H. 8. cap. 6. concerning Recognizances in the Nature of a Statute Staple refers to the Statute Staple, that the like Execution shall be had and made, &c. and the Statute Staple refers to the Statute Merchant, and that to the Statute of *Aston Burnell*, 13 Ed. 1. which provides, That if it be found by the Roll and by the Bill that the Debt was acknowledged, and that the day of Payment is expired, that then, &c. but if the Statute be burnt, it cannot appear that the day of Payment is expired, and consequently there can be no Execution. If the Conusee will take his Action Stat' must be produce'd in Court. upon it, he must say, *Hic in Curia prolat*, 15 H. 7. 16. 1 Mod. 186. *Buckly and Howard*.

Recognizance in nature of a Statute Staple of 600 l. pleaded by Administrator against a Bond of 300 l. and *plene Administravit præter* Goods to the value of 12 d. Replic^s sets forth the Certificate of the Recognizance in Chancery, and the *Capias si Laicus sit*. Return of the Writ, that the Conusor was dead, 23 June, 2 Jac. 2. Breif Certificate of the Recognizance in Chancery *d'Extent* Issued. Return of the Writ, and Inquisition taken, 25 Oct. 2 Jac. 2. The Lands found by the Inquisition and the several

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several yearly Values. *Omnia quæ quidem Messuagia Terras & Tenementa pred' cum pertin' pred' W. S. tunc Vicecomes pred' Com' Lincoln pred' 25 die Oct. Anno dicti Domini Regis nunc secundo sup'dict' in manus dicti Domini Regis nunc per Extent pred' seisiri fecisset prout per idem breve ult' mentionat' & per eand' Inquisitionem pred' brevi ulterius mentionat' annex' coram prefat' tunc Vic' Com' pred' Lincoln Capr' in Filaciis dicte Cur' Canc' dicti Dom' Regis nunc apud Westm' pred' in Com' Middlesex pred' de Recordo residen' plenius liquet super quo dictus Dom' Rex nunc postea, scilt' &c. per quoddam aliud breve ipsius Dom' Regis nunc e pred' Cur' Cancellar' ipsius Dom' Regis apud Westm' pred' adtunc emanant' prefat' tunc Vic' Lincoln direct' eid' Vic' precepit qd' idem Vic' prefat' E. O. (the Conusee) pred' Capital' Messuag', &c. & cetera omnia & singula premissa predict' cum pertin' in Balliva prefat' tunc Vic' Lincoln pred' si ea per Extent' pred' recipere voluit liberaret tenend' eid' E. O. & assign' suis ut liberum tenementum ipsius E. O. quousque sit de debito predicto una cum damnis misis & expensis suis quæ in ea parte rationabiliter sustinisset plenarie satisfact' fuerit. Et qualiter, &c. The Writ returned that he had 20 Nov. in the same Year, delivered; and that the Conusee had received the Lands extended, and of them was and yet is possessed. Demurr.*

These

These Exceptions were taken to the Bar.

1. The Plea saith the Recognizance was *debito modo Capt'*, but doth not say how.

It is said it was taken *coram Vaughan C. J. & secundum formam Statuti*, which is sufficient.

2. It is not said that it was *per script' Obligatorium*.

It is said *Qd' per Recognit' in natura Stat' Staple recognovit*, which is sufficient.

3. It is not said that the Statute was Inrolled according to the Form of the Statute, and so void.

The Statute of 27 *Eliz.* extends only to Purchasers of Lands, and not to Creditors.

4. For any thing it appears the Debt may be satisfied.

It is said it was not satisfied by the Co-
nutor or by the Defendant, and it cannot
be satisfied by the Extent for the Debt is
300 *l.* and the *Liberate* did not issue till the
2 *July*, and the Lands are but of the value
of 50 *l. per Annum*, and therefore shall not
be intended to be satisfied.

How it shall not be intended that the Debt was satisfied.

5. It is said that the Statute remains unsatisfied, but saith not at what place.

It need not : For if it be unsatisfied it remains in Places unsatisfied, and further no Issue is to be taken upon it. But the Plain-

Plaintiff in his Replication ought to shew how it is satisfied ; and further, such Recognizance is never produced in Pleading. The Plaintiff had Judgment as to the matter in Law *pro Quer*, *Vide 2 Cro. 338. 639. Syd. 356. Vide 3 Levins 219. Barker and Dye.* Where such Judgment is given, as in the Case here.

1 *Lut. 429. Young and Johnson.*

Extendors extending too high.

By the Statute of *Acton Burnell*, if the Extendors extend the Land too high, *Statim respondeant illi, &c. (Statim)* is not that the Extendors shall pay presently, but without delay, at the time limited by the Statute.

To what Sort of Extents the Statute of Acton Burnell shall be intended.

It was the Opinion of the Justices of the Common Bench, That if upon a Writ of *Elegit* or other Writ of Execution sued upon a Judgment, the Extendors extend the Lands or Goods too high, that now the Plaintiff hath no Remedy by the Statute of *Acton Burnell* or *de Mercatoribus*, or otherwise to pray that the Extendors themselves may have the Lands, or take the Goods, or pay the Money which were Appraised for them ; because those Statutes were

were penal Laws, and do not extend to other Writs of Execution, but only upon a Statute Staple, Merchant or Recognizance. *Bendl. 15.*

In *Scire fac'* on a Recognizance in *Chancery* the Parties being at Issue, the Record was sent into the *King's Bench* to be Tried, and it was found *pro Quer'*, who had Judgment; and on *Elegit* divers Lands were extended, and offered by the Sheriff to be delivered to the Party according to the Extent, which the Plaintiff refused before the Sheriff because they were too high. And at the Day of the Return of the Writ the Plaintiff came in *B. R.* and prayed that the Extensors might retain the Lands according to the Statute of *Acton Burnell. Per Cur'*, upon an Execution upon a Recognizance for Debt, if the Land be extended too high the Plaintiff may pray that the Extensors may retain, &c. as well as upon an Extent on a Statute Merchant or Staple, and that it is within the Equity of the Statute of *Acton Burnell*. But in a *Scire facias* upon Bail, and Recovery and Execution thereupon, it is otherwise. So it was awarded, that the Extensors should have the Land at that Rate, and should pay the Debt. *Cro. Jac. 12. Molineux and Lacan.*

In case where Extensors upon *Elegit*, or other Act of Execution, or upon a Recognizance in Court, do extend the Lands too high, they shall not be forced

to

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to take it at the Rate as the Extensors of Lands on a Statute Merchant, Staple, or Recognizance, in nature of a Statute Staple, shall.

M. as Administrator of *M.* extends a Statute upon the Lands of *R.* and before his Acceptance prays that the Lands may be delivered to the Extensors; wherefore Process issued accordingly, and before the Return of the Writ the Court was moved, that the Extensors cannot have the Land, because after the Extent *R.* is dead, his Heir within Age, and in Ward to the King, so that the King is now in Possession, and the Land is in other plight than it was at the time of the Extent, *sed non allocatur.* And by *Popham*, the Extensors ought to sue to be relieved in the Court of Wards. *Telv. 55. Molineux versus Riggs.*

Though the moveable Goods are sold for less than they are worth, yet is the Debtor without remedy, and it shall be imputed to his own Folly that he would not sell them himself when he might.

Contribution.

M. Herbert acknowledgeth a Recognizance to the King of 3000 *l.* After his Death *Scire facias* issues out of the *Exchequer* against his Executors, and against the Heir of his Lands and Tenements. The Sheriff returns he had no Executors within his Bailly-

Bailiwick ; and further, that *Sci f. ci Willielmo Herbert Mil' Filio & Heredi dicti M. H. per J. D. & R. D. qd' sit coram Baronibus, &c.* And at the Day of the Return Sir William makes default, whereupon the Barons gave Judgment, *Qd' dicta Dom' Regina recuperet versus dict' Will. H. dicta 3 millia Librarum & qd' ipse idem Willielmus de iisdem 3000l. exoneretur & ei inde satisfaciat.*

Resolved, In case of a Common Person, the Heir of the Conusor, or of him against whom Judgment in Debt is given, shall be only charged in some Cases, and in some Cases he shall have Contribution against other Terre-tenants.

If a Man be seised of three Acres of Land, and acknowledges a Recognizance or Statute, and Enfeoffs *A.* of one Acre, *B.* of another, and the third descends to his Heir ; if Execution be sued against the Heir only, he shall not have Contribution, for he comes to the Land without Consideration, and sits in the Seat of his Ancestor. And the Heir shall not have Contribution against any Purchaser, tho' the Purchaser comes to the Land without any valuable Consideration, for the Consideration is not material in this Case. For although in the Case of a Statute, Recognizance, or Judgment, the Heir is charged as Terre-tenant, and not as Heir, the Reason is, that by the Statute or Recognizance the Heir is not bound, but the

In some Cases the Heir shall be only charged.

The Heir not to have Contribution against a Purchaser.

Where the Heir is charged as Tertenant.

T

Conusor

The Law of Executions.

Conufor concedit qd^a dicta pecunie summa de Terris, &c. Levetur, yet he shall not have Contribution against or from a Purchaser.

The Heir of him against whom Judgment is given, shall not have Contribution against the Terre-tenant; and therefore if he sell part of his Lands, and keep part in his Hands, and the Conufee sue Execution of the Lands only in the Hands of the Conufor, or his Heirs, in this Case neither he nor his Heirs shall have any Contribution from a Purchaser as they shall have against him. *Plowd. 72. Jenk. Cent. 1. Case 69.*

Where the Heir shall have Contribution.

If a Man be seised of two Acres; one of the Nature of Borough *Engliſh*, and binds himself in a Statute or Recognizance, or Judgment in Debt is given against him, and dies, having Issue two Daughters, who make Partition; in this Case, if one be only charged ſhe ſhall have Contribution. For as one Purchaser ſhall have Contribution against another, and against the Heir alſo, ſo one Heir ſhall have Contribution against another Heir. For they are in *equali jure*. So in caſe where ſome of his Lands deſcend to the Heir of the Part of the Father, and ſome to the Heir of the Part of the Mother.

One Purchaser
ſhall have
Contribution
on againſt
another.

Though

Though Sir *W H.* the Heir (in this Case) was charged as Terre-tenant, yet *causa quæ supra*, the Writ which issued against him only was good.

If two, four or more Men are severally seised of Land, and they all join in a Recognizance, in this Case the Conussee shall not extend the Lands of some of the Conusors only, but all ought to be equally charged. For although the Land of the Conusor himself may be equally extended, when divers Men have purchased any of the Lands subject to the Recognizance, for that the Purchasor is in other degree than the Conusor himself, yet one of the Conusors shall not be equally charged, for he stands in equal degree with the other Conusors.

Where the Lands of all the Conusors shall be charged.

If two Men alien Land with Warranty, the Land of one shall not be only rendred in value, but the Charge shall be equal upon them; for joint Lien which binds the Lands shall not survive, or shall lie only upon the Survivor, but in the Lien Personal otherwise it is, as if two are bound in a Bond, there the Charge shall survive.

Real Lien.
Personal Lien.

Nota, Where it is said, if one Purchasor shall be only extended for the whole Debt, that he shall have Contribution, it is not intended that the other shall give or allow to him any thing by the way of Contribution, but the Party which is only extended may by way of *Audita Querela* or

How the Contribution shall be made.

The Law of Executions.

Scire facias, as the Case requires, defeat the Execution, and by this shall be restored to all the mean Profits, and force the Conusee to sue Execution of all the Land, and so every one shall be Contributors, *i. e.* the Land of every Terre-tenant shall be equally extended. 3 Rep. Sir William Herbert's Case.

CAP

C A P. XVI.

What Executions are well executed not being returned, and what not. Judgment with a Cessat Executio, in what Cases. Pleadings as to Execution. Where a Man is estop'd for ever for want of Pleading. What may be Pleaded in Bar of a new Execution. Inquisition, how to be taken. Where void, or not.

EXecution upon a Statute, upon the *Extendi fac'* a *Liberate* issued forth, upon which the Lands were delivered, but was not returned, yet the Execution is good. This difference was taken. In a *Cap' ad Sat'* and *Fieri fac'* the Words are conditional, *Ita qd' habeas Corpus, &c. Ita qd' habeas Denarios hic in Curia* : Contrary in *Liberate, Habere fac' Possession'*, *Seisinam* ; in such Writs there is no such Clause, and therefore such Writs be not returned. Execution done by vertue of them is good enough, 11 H. 4. 121. If the Sheriff by force of an *Elegit* delivers to the Party the Moiety of the Land of the Defendant, and doth not return the Writ, if now the Plaintiff will bring an Action of Debt *de novo*, the Defendant may plead in Bar the Execution aforesaid, though the Writ of Execution were not returned, and yet the Execution is not upon Record. 1 Leon. 280. *Penruddock* and *Newman*.

The Law of Executions.

An Extent was sued upon a Statute Merchant by the Plaintiff against the Defendant for Lands in his Possession in the County of *Southampton*; the Sheriff put the Plaintiff, the Conusee, in possession of a parcel of House and Lands, and suffered the Defendant to continue in the rest of the House, by reason whereof *H.* the Defendant held the possession of the whole, and kept the Conusee out. The Conusee, to the intent he might have full and perfect possession of the whole, caused the Sheriff that he did not return the Writ of Extent, upon which it was entred upon the Roll, *Quod Vic' nihil inde fecit nec misit breve*. Whereupon issued an *Alias extendi fac'*, upon which the new Sheriff returned, that in the time of the old Sheriff a Writ of Extent issued forth, &c. and that the said Sheriff had extended the Lands, by reason whereof the new Sheriff could not extend them upon a new Writ. By the *Prothonaries*, and *per Cur'*, our Course is, when no Return of such Writ is made to grant an *Alias* at the Prayer of the Party, and to enter upon the Roll that the Sheriff upon the first Writ *Nihil inde fecit nec misit breve*; for upon such surmise, and such Entry upon the Roll, an *Alias breve* might well be awarded. But if the Entry upon the Roll had not been, then the same had been a good Execution for the Party, though it be not returned.

2 Leon. 12. Colshall and Hastings.

Alias extendi fac'
and upon
the Sheriff's
Return.

And how
to be en-
tered.

Judgment

Judgment with a Cesset Executio, in what Cases.

In a *Quare Impedit* where the Bishop disclaims, and the Parson loseth by default, there shall go a Writ to the Bishop, *Non obstante reclamatione*, to remove the Incumbent, but with a *Cesset Executio*, until the Plea is determined between the Plaintiff and the Patron. *Vaughan 6. 6 Rep. 48.*

Where one of the Defendants pleads to Issue, and the other Demurrs, and the Plaintiff hath Judgment upon the Demurrer, there shall be a *Cesset Executio quousque placitum terminat' est* upon the Issue. *2 Sanders 24.*

In a *Warrantia Chartæ*, Writ of *Mesne*, or Dower, where the Heir pleads Detinue of Charters, Judgment may be given presently with a *Cesset Executio*. *Hob. 39.*

Debt against Executor, he pleads *Riens enter les maines*, and indeed hath then nothing, the Plaintiff may have Judgment for his Debt presently to be had by *Scire fac'* when Goods shall come to his Hands. *8 Rep. 134. Hob. 199.*

So in Debt against the Heir, if he pleads *Riens per descens*, the Plaintiff may have Judgment presently, and a *Scire fac'* when Assets descend.

P L E A D I N G.

Vide supra, where Execution with Satisfaction against one shall serve for the other.

Though it did not appear by the Declaration in *Audita Quer'* on Defeazance of a Statute, that the Statute had three Seals according to 23 H. 8. yet it is well enough. For though the Execution be ill made, yet the *Audita Querela* lies. *Aliter*, where he brings an Action on the Statute, for there he is to say that it was sealed with three Seals; but where he saith that it was acknowledged according to the Statute, it shall be intended to be with three Seals. *Moor, Case 1097. Trot and Spurling.*

Where it must be alleged the Statute was sealed with Seals.

Monstre les foits.

A Tenant by Statute Staple or Elegit, that hath extended an Abbot's Lease, or a Lease made out of the Abbot's Lease, is not bound to shew it, because he comes in by the Act of Law: But any other that comes in under the Lease, must shew it by the Opinion of the whole Court. *Brownl. and Golds. 38.*

Recovery and Execution pleaded for the same Debt.

Two were bound jointly and severally; in Action brought against one, he Pleads that the Plaintiff *auter foits* recovered against the other, and for the same Debt, and had Execution, the Plea is good, and the Execution is of the Record, and it shall be tried by the Record; for if he had paid this in the Country to the Plaintiff, and not

not in Court, this is no Execution of the Judgment. *Moor* 329.

A Man may plead divers Matters after What the Judgment given to Bar the Plaintiff of Execution, as Outlawry, or a Release of Action, &c. 2 *Inst.* 470. things may be pleaded after Judgment given

Tenant for Life, the Remainder to his Issue in Tail. The Tenant for Life enters into a Statute and dies. Conusee sues a *Scire facias* against his Heir, who was the Issue in Tail, and the Sheriff returns *Scire feci*; and upon this Execution, without any Plea pleaded by the Heir, and the Heir being ousted by Execution brought Ejectment. *Per Cur'*, the Heir or Issue in Tail shall be bound by this Execution: He hath no Remedy either by Ejectment, Writ of Error, or *Audita Quer'*, nor any other way but against the Sheriff; if he made a false Return of the *Scire fac'*, the Law shall adjudge it his fault that he did not come in and plead it upon the *Scire fac'*: And for this if the Conusor hath a Release made before the *Scire fac'*, and come not in upon the *Scire fac'* returned, and plead it, he shall be estop'd for ever to take any Benefit of it. 1 *Syd.* 54. *Day and Guildford.* Execution against Issue in Tail for want of Pleading.

A Man may not Plead Execution without shewing the Judgment in Covenant to save harmless against all Eviction or Expulsion. The Defendant pleads *J. S.* ousted him by *Hab' fac' Possessionem*, Plaintiff Demurs: The Plea is ill, because he pleads an Expulsion by Execution without shewing any Judgment. He ought to have Plead-
ed One cannot plead Execution without shewing the Judgment.

The Law of Executions.

ed that J. S. brought Ejectment, upon which *taliter processum fuit qd' consideratum fuit*, that he should recover, and upon this the *Habere fac' possessionem*. 1 Levins 83. Nicholas versus Pullen.

One Pleads an Extent of the Goods and delivered to the Conusee, and saith not *per Sacramentum*, it's ill. Cro. El. 735. 756.

What may be pleaded in Bar of a new Execution.

The Plaintiff may File a *Fieri facias*, part of the Debt being levied thereby on Judgment (to the intent to have *Audita Querela* on *Elegit* executed after it) and so it may be done had the Sheriff only taken Bond (by assent of the Parties) for payment of the Money: And the taking such Bond was adjudged in a Western Cause at Exeter, to be pleadable in Bar of a new Execution. 1 Keb. 551. Ward and Hambell.

Vide Cro. Eliz. 71. Brown and Whitton supra.

Inquisition, where void, or not, and how to be made. Vide Liberate.

Not good
for not
finding the
certainty of
the Term.

On Extent it was found by Inquisition that R. the Debtor was possess'd of a Lease for the Terms *quorundam annorum ad hoc adventurorum*, it's void, because the certainty of the Term was not found. 2 Lev. 121. Rushton's Case.

The

The Bailiff of a Liberty may take and make Inquisition, and an Extent upon an *Elegit* by Warrant from the Sheriff directed to him. When a Jury by Inquisition finds the Seisin and value of the Land, the Jury shall extend all the Land, and the Bailiff of a Franchise, or the Sheriff where no Franchise is, shall deliver the Moiety, and not the Jury. *Cro. Car. 232. Sparrow's Case.*

In *Hill. 10 Jac.* Two Inquisitions taken at several Days by several Juries upon one Statute Merchant were adjudged naught; one was taken of the Land, and the other for the Land and Goods. And the Extent of the whole 4th part was naught, for it should be of the Moiety of the 4th part. And note, it was but a Lease, and the Sheriff might have sold it as Goods; but seeing he had extended it, in this case he should receive Benefit but as in a common Extent. *Mich. 10 Jac. Brownl. and Golds. 38.*

Upon *Elegit* the Extent must be *per Sacramentum duodecim*, and not by the Sheriff himself, although the Writ do not speak of an Inquisition. *Dyer 100.*

In Debt on a Lease for Years. Conussee of a Statute takes a Lease for Years of the Reversion, and Rent reserved upon the Lease for Years, Lessee Attorns, and then he extends. A puisny Conussee extends, and adjudged for him, because the former Extent was suspended during the Years: But Error in the *Exchequer Chamber* was on the Declaration, for that it did not comprehend sufficient Title; for it was ground-

Two Inquisitions taken at several days by several Juries, ill.

How the Extent must be upon *Elegit*.

Extent
ought al-
ways to be
by Inqui-
sition.

ed upon an Extent, which ought always to be by Inquisition, and the Sheriff himself without an Inquisition cannot execute it. and here it is not that the Sheriff returned the Inquisition, but that the Reversion and Rent were delivered in Extent, and this was held an incurable fault. *Cro. Jac. 569. Harrington and Garraway.*

Inquisition
taken after
death of
the Party,
to whom
the Lands
are to be
delivered.

An Extent was sued by an Executrix upon a Statute Staple made to her Testator, and she dies before the Inquisition taken, the Inquisition taken after her Death is void. For the Writ is to Appraise and Seise into the hands of the King, *ut ea Liberari faciamus* to the said Executrix, and she being dead before the said Inquisition was taken (so as it cannot be delivered to her) the Inquisition taken after and returned is void.

Where the
Inquisition
must shew
the com-
mencement
of the Term

A Term for Years may be delivered to the Party in Execution upon *Elegit*, but then the Inquisition must shew the commencement and certainty of the Term. *4 Rep. 74. Vide 2 Inst. 394.*

By Death, or not.

If the Plaintiff at whose Suit be dead after the Execution taken out before the Defendant was Arrested, as appeared by the Report of the Secondary, yet the Execution shall not be set aside; for, *per Cur'*, now he must lie till Agreement with the Executors or Administrators. But if the Plaintiff

Plaintiff had died before Judgment or Verdict, he might have been discharged. 2 Keb. 516. King and Milton.

By Protection, or not.

In Debt on Judgment, Defendant pleads that the Plaintiff took out a *Capias* against him, and Arrested him, and that thereupon he was discharged by Protection allowed, shewed to the Bailiff as Servant to the Earl of Bath, not saying *infra menia*, but only in his Affairs. Plaintiff demurred, because Privileges ought not to be allow'd to Execution. 1 Inst. 131. The Plea is ill. 1 Keb. 660. Cockman and Symonds.

CAP.

C A P. XVII.

By what ways Execution of Body or Lands is discharged. Of the Body, by Release, and by what Words. By Surrender of the Estate in Extent. By Escape. By Matter ex post facto. Of Lands; by Release; by Descent; by Purchase; by Defeazance; by Escape. How a Man may be discharged out of Execution. Of Execution being reversed, and the Judgment stands, and the Consequence. Execution Superseded or Reversed by Error. Stat. 13 Car. 2. c. 2. and 16 Car. 2. c. 8. explained. Of Restitution by reason of Reversal by Error. In Recovery of Land by erroneous Judgment, which is Reversed. How the Restitution shall be, and from what time. Restitution in Fieri facias, and Utlary reversed. Pleading in a Seire facias for Restitution. Sheriff's Fees for Execution. Judgment and Execution in Inferior Courts Plead- ed, and how.

TWO are bound jointly and severally, and the Obligee sues one of them in *B. C.* and the other in *B. R.* and had against him in *B. R.* a *Capias*, and took him in Execution, and after took an *Elegit* against the other, and had Lands and Goods delivered in Execution, as he well might; the other in Execution by his Body had an *Audita Quer'*, and was delivered. And because the Judgment in this Case must be
that

that he be discharged of the Execution, he shall never be taken again, though the Land taken in Execution be evicted. *Hob. p. 2.*

Of Body ; by Release.

If the Body of a Man be taken in Execution, a Release of all Actions will not discharge him; but if he release all Debts and Duties he shall be discharged of the Execution, because the Debt or Duty it self is discharged.

And if a Man release all Suits the Execution is gone, for no Man can have Execution without Prayer or Suit but the King only; and therefore such a Release will not bar him.

If a Judgment be given in Debt, and the Body of the Defendant is taken in Execution, and after the Plaintiff releaseth the Judgment; by this the Body shall be discharged of the Execution: By a Release of all Demands, Execution is discharged, and also all Statutes, Recognizances, Obligations, &c. *1 Inst. 291.*

A Statute was acknowledged the 26th of May, the Conusee made a Release the 25th day of all Demands, *usque confectiorem presentium*, and delivered the same the 27th day, by this the Statute is discharged, for the day of the delivery is the day of the making of it; but if the words had been *usque datum presentium*, the Statute had not been

been discharged. *Dyer* 307. 5 *Rep. Clayton's Case.*

I may discharge one in Execution at my Suit by Parol. *Poph.* 206, 207.

If one release the Imprisonment only,
Q. if it be a discharge of Execution.
Herly 79.

If the Conufee shall before or after the Execution release to the Conufor of the Statute or Recognizance the same Statute or Recognizance, or the Debt, this will be a perpetual discharge of the Statute and Execution thereupon.

The first
Damages
and Costs
only dis-
charged by
general
words.

J. D. 10 *Jac.* on Trespafs had Judgment, 14*l.* Damages, 5*l.* Costs against C. in *B. R.* 11 *June*, C. brought Error, and Judgment was affirmed, and 5*l.* there assessed for Costs for delaying Execution. D. did not enter the first Judgment, but mean between the first Judgment and the Judgment in the Writ of Error, he released to C. all Executions and Demands, yet notwithstanding this Release he had sued Execution for the 14*l.* and the 5*l.* on the first Judgment, and for the Costs on the Writ of Error. *Per Cur'*, this Release shall help C. in *And' Quer'*. for he had no time to plead it: And tho' the Execution be entire, yet that is no cause of discharging the whole but only of the first Damages and Costs, and he was discharged *quoad* them. *Cro. Jac.* 337. *Child and Durrant.*

By

By Surrender of the Estate in Extent.

If the Conusee of a Statute Merchant hath the Body and Lands of the Conusor in Execution, and then the Conusee surrenders his Estate which he hath by Extent, hereby the Execution of the Body is discharged, and he may have *Scire facias* on *Audita Querela*, 15 Ed. 4. c. 11. 2 Levins 117.

Upon an Exigent after Judgment the Defendant may not appear *gratis*, and plead a Release of Execution, and have a *Scire facias*, &c. but upon a *Cepi* or *Reddidit* se, but being at large he shall have *Audita Quer.* Dyer 286. Where the Defendant may appear *gratis*, and may appear *gratis*, and and plead a Release of Execution.

If three Conusees be in Execution, and the Conusor doth discharge one of them, the same is a discharge of all. 2 Leon. 117. Discharge of one a discharge of all. *Linacre* and *Rhodes*.

By Escape.

If Conusor go at large by assent of the the Conusee, the whole Execution of the Body and Land is discharged. 2 Leon. 117.

Two were Condemned in Debt, one is taken by *Cap' ad Sat.*, and suffered by the Sheriff to Escape, and then the other is taken in Execution, this is no cause to discharge him. *Cro. El.* 748. *Blofield's Case*.

But of a Debt recovered by Judgment, if the Plaintiff lay the Defendant in Prison
V upon

The Law of Executions.

upon a *Capias ad Satisfac'*, and the Sheriff lets him at Liberty, he is discharged.

If a Man be in Execution by his Body and Lands upon a Statute, if the Sheriff permit the Conusor to go at Liberty, yet the Execution of the Land is not discharged; *Aliter*, if he go at large by consent of the Conusee, 1 *Leon. Case* 313.

By Matter ex post facto.

Where an Administrator had Judgment and Execution for a Debt or Duty due to the Intestate, and after the Administration is repealed the Defendant shall be discharged against the Plaintiff, and shall be chargeable to the new Administrator in a new Action. 2 *Sanders* 147, 150. *Turner* and *Davis*. The Law abhors circuitry of Action.

Of the Land.

By Release.

✓ If the Conusee before Execution release to the Conusor all his Right in or to the Land, yet he may sue Execution of the Land, but such a Release made after Execution made of the Land, will discharge it.

If the Conusee release all his Right in the Land, this doth not discharge the Statute, for the Land is not charged but the Body. 10 *Rep.* 47. b. *Lampet's Case*.

If

The Law of Executions.

291

If the Conusee release all Right in the Land, and all Actions that he may have by cause of the Statute in the same Land, this dischargeth the Land. 25 Ed. 3. 51.

If the Conusee doth release the Debt, this determines the Estate by Extent.

By Descent.

If Execution be sued of Body and Lands upon a Statute Merchant or Staple, and after the Inheritance of part of these Lands descend to the Conusee all the Execution is avoided, for the Duty is personal, and cannot be divided by Action in Law. 1 Inst. 150.

If the Inheritance of part of the Land extended comes to the Conusee, it destroys the whole Extent, otherwise the Conusee would hold the residue of the Land longer, because the Profits that should go in Satisfaction of the Debt must be less, and this would be to the wrong of him in the Reversion.

By Purchase.

If the Conusee purchase parcel of the Land, and after the Conusor alien the residue of the Land to a Stranger, J. S. shall hold his Land purchased discharged, for that he ought to have Contribution against the Conusee, and he cannot contribute to himself, and for this by his Purchase all

purchaser's parcel of the Land, and Conusor for aliens the residue.

V 2 the

The Law of Executions.

the Lands which come to the Hands of the Feoffees are discharged. *Com.* 72. b. *Pope* and *Rofs.* But the Conusor's Body and Goods are liable.

Execution
of Lands
that are
left in the
Hands of
the Conu-
see.

If the Conusee after Execution sued Purchase any parcel of the Land, by this the whole Execution is discharged; but this is no discharge of the Body and Goods of the Conusor. If the Conusee purchase any part of the Land of the Conusor after the Statute or Recognizance entred into, this will be no discharge of the Statute or Recognizance, but the Conusee may have Execution notwithstanding of the Lands that are left in the Hands of the Conusee, or of his Body and Goods. But if the Conusee purchase parcel of the Land, and a Stranger purchase another parcel, in this Case the Land purchased by the Stranger shall be discharged of the Execution.

Purchase
by way of
Uses of a
Fine.

Will. Humfry, the Conusor's Father, was seised of divers Lands in Fee, and levied a Fine of them to the use of himself for Life, and of part of them to the Plaintiff (in the *Audita Quer'*) in Tail, and of the residue to the Conusee in Fee, and died; and because the Conusee afterwards sued Execution he brought this *Audita Quer'*, and on Demurrer it was adjudged that this Purchase in this manner was a sufficient discharge of this Statute. *Cro. Eliz.* 756. *Humfry* and *Harvy.*

If one acknowledge a Recognizance to another, and after levy a Fine to him of part of his Land, his Person is not discharged

ged by this, but he may afterwards take his Body for the Debt, otherwise it were if the Purchase was after Execution had. *Plowd. 72.*

The Diversity is this, if the Conusee purchase parcel of the Land of the Conusor after the Statute acknowledged, this will be no discharge of the Statute against the Conusor himself, but by this the other Purchasers of the Lands will be discharged. But if the Conusee have the Land delivered to him in Execution, and after this purchase parcel of the Land of the Conusee, this will be a discharge of the entire Statute. *11 H. 7. 4. Cro. El. 736.*

Diversity between Conusees purchase of parcel after the Statute acknowledged, and after the Land delivered to him in Execution.

If a Lessee for Life makes a Lease for Years rendring Rent, and after enters into a Statute to *J. S.* and then enters into another Statute to *J. S.* and after he doth grant his Estate to *J. S.* by this the Execution of the Statute made to *J. S.* is suspended, and during that Suspension it seems *J. D.* although he be after it, in time may sue and have the Rent in Execution, *19 Jac. B. R. Harrington's Case, vide supra.*

Suspension.

Where the Execution is entire, if part is discharged all is discharged; as where Execution is had of Lands, if he who hath Execution release the Execution of one Acre, this will discharge the Execution of the whole, and so where the Conusee purchaseth parcel of the Land, and the Conusor Enfeoffs others of the residue, the entire Execution is discharged. So if an Acre of Land charged with the Execution

Reg.

descend to him that had it ; for the Land is appraised at yearly value, but where the Defendant is taken upon a Recognisance, and was in the Custody of the Sheriff, who suffers him voluntarily to Escape, no Execution being of his Lands or Chattels, the Lands and Chattels are not discharged tho' the Body is. 1 *And.* 266. *Linacre's Case.*

Conusee

takes a Fine
to the use
of another.

Conusee of a Statute took a Fine of the Land of the Conusor to the use of another, it was held no discharge of the Execution ; for the Statute 27 *H. 8.* of Uses, hath in it a saving of eigne Titles, &c. that the Feoffees have or after may have. *Dyer* 149.

Conusee

re-enseoffs
the Conu-
for.

If the Conusor enfeoff the Conusee of the Land, and after the Conusee re-enseoffs the Feoffor, the Statute may be extended upon this Law. 25 *Ed.* 3. 51.

By Defeazance.

Statutes or Recognizances may be discharged or suspended by Defeazance upon Payment of Money or other Act. If *A.* be bound in a Statute to *B.* in 20 *l.* and *B.* sues Execution, and the Lands of *A.* are delivered to him in Execution, until he levy the Money, and after *B.* doth make a Defeazance to *A.* by Indenture, that if *A.* pay 10 *l.* such a day, that then the Statute or Recognizance shall be void, if this be done accordingly the Statute and Execution is discharged, and he may be relieved by *And' Quer'*. *Dyer* 297.

Divers

Divers are bound in a Recognizance and one of them dies, his Heir within Age, and a *Scire Facias* is brought against the others, the Execution shall be suspended against them all, for their Land ought to be equally charged; and because the Land of the one may not be charged during the Non-age of the Heir, the other shall not be chargeable till his full Age.

Suspension
by reason
of the non-
age of the
Heir.

Jenk. Cent. 1. Case 69.

Otherwise it is where Land is recovered by Judgment against *A.* and *A.* dies seised, his Heir within Age, upon a *Scire facias* to execute this Judgment, Age shall not be granted. And yet *Fitz. N. B. 365.* where a joint Judgment is had against three in Debt, and one of them die, his Heir within Age, the Suit must be staid for all till his Age.

Parol De-
murrer.

If a Lease be made of all the Land for Life or Years after a Statute is acknowledged, and after the Conusor dies, his Heir within Age, this Land during the Lease is extendible, *terra transi: cum onere*, and this Extent shall last during the Lives and the Years, but afterwards shall be suspended during the Nonage of the Heir. *Jenk. Cent. 1. Case 69.*

Statute was acknowledged by *B.* to *S.* *B.* sold his Land in *Com' Hertf.* to *Trott*, and now the Extent was had of Lands in the Hands of *Trott*, who brought his *Aud' Quer'* upon a Deseazance made thus, that if the Land in the County of *Hertford* shall be extended upon the Statute, then the

Statute shall be void ; and he alledgeth in *facto*, that this Land was extended, and Judgment *pro Quer'*, for the Defeazance was held good. *Moor, Case 1097. Trott and Spurling.*

Where Ar-
ticles are
not good to
discharge
one of Ex-
ecution.

B. was in Execution upon a Statute Merchant at the Suit of *R.* and in *Audita Quer'* set forth certain Articles made between them to discharge him of the Statute, and prays to be let to Mainprise ; but it was denied, because upon a surmise only : And the Articles are not good to discharge him of the Execution, but he must have Action of Covenant. *Cro. Jac. 218. Belfon and Robinson.*

By Escape.

By voluntary Escape the Execution is not discharged.

If the Conusor go at large by consent of the Conusee, the whole Execution of the Body and Lands is discharged, and the Conusor shall have his Land presently. 2 *Leon.* 117.

If a Man be in Execution by his Body and Lands upon a Statute, if the Sheriff permit the Conusor to go at Liberty, yet the Execution of the Lands is not discharged ; *Aliter*, if he go at large by consent of the Conusee. 1 *Leon.* n. 313.

If *A.* recover against *B.* in Debt, and *B.* is taken by *Cap. ad Satisfac'*, and after the Sheriff suffers him to Escape, in this Case

B. is

B. is fully discharged. *Aliter*, in Case of a Statute Merchant, for the Plaintiff shall have Execution of his Lands in such a Case.

Where the Defendant is taken upon a Recognizance, and was in the Custody of the Sheriff, who suffers him voluntarily to Escape, no Execution being of his Lands or Chattels, the Lands and Chattels are not discharged though the Body is. 1 *And.* 266. *Linacre's Case.*

How and for what Causes a Man may be discharged out of Execution.

C. was Condemned in the Sheriffs Court, London, for Debt, and taken in Execution. Afterwards by *Habeas Corpus* on Suit in *B. R.* the said Execution with other Causes was returned; whereupon he was committed to the Marshal in Execution for that Debt, and other his Executions in the *King's-Bench*, and now all the Executions in the *King's-Bench* were discharged, and the Judgment in London reversed by Writ of Error in the *Hustings*: And how he should be discharged of this Execution was the Question. For this Court of *King's-Bench* hath no Record of the Execution but by the Return of the *Habeas Corpus*, and of the Reversal of that Judgment they have not any Record but what is only surmised. And they may not Award a *Certiorari* to London, for they will not return it. *Per Cur;*

Discharge
in London
after remo-
val by *Hab*^s
Corpus.

Cur', all Matters here concerning the Executions being discharged, he may be remitted to *London* for that Cause, and there be discharged. *Cro. Car.* 128. *Cusack's Case*.

One once discharged of Execution, never to be taken again. *Vide supra & infra, Wiseman and Fish.*

Not by *Hab' Corpus* or Writ of Privilege.
Not on a Surmise only.

One in Execution may not be discharged by *Hab' Corpus* or Writ of Privilege. 1 *Syd.* 289.

One in Execution ought not to be let to Mainprise upon a surmise only. *B.* was in Execution upon a Statute Merchant at the Suit of *R.* and in *Audita Quer'* set forth certain Articles made between them to discharge him of the Statute, and prays to be let to Mainprise, but it was denied, because upon a Surmise only. *Cro. Jac.* 218. *Beston and Robinson.*

Not upon a Motion.

The Court will not discharge one in Execution upon a Motion, but he ought to have *Audita Quer'*. 1 *Syd.* 47.

Apfley was brought by an *Hab' Corpus* to the Bar, it was returned that he was committed by the Court of *Chancery* for a Contempt to the Court. Resolved, he should be discharged. But, 13 *Jac.* *Allen* and *Wood's Case* was, *Allen* was committed to the *Fleet* by the Lord Chancellor for a Contempt in not performing a Decree, and upon that Return the Court refused to deliver him. *Moor.*

The Plaintiff having two Judgments in this Court against the Defendant, and Execution

ecution against him, and he actually in *Custod' Marr'*, the Defendant forgeth a Letter of Attorney to acknowledge Satisfaction, which being delivered into the Office, *Walter* the Officer certifieth to the Marshal that he had received a Warrant between such Parties, by reason whereof the Marshal lets him go. *Per Cur'*, this is an Escape, unless the Attorney's Hand were to it, or a *Supersedeas* delivered, and the Court cannot Award any new Execution, *quia improvide* in neither Case without *Supersedeas*. One *Collet's* Case.

Execution reversed, and Judgment stands, and the Consequence.

Though the Execution be reversed, yet the Judgment may stand good.

Error of a Judgment and Execution in *B. C.* The Error assign'd was for that *Wells* recovered against *Dennis* 400 Marks, and had Execution by *Fieri fac'*, and upon it the Sheriff returned that he had levied 90 *l.* parcel of the Debt, and had the Money in Court, and that the Defendant had no more Goods, *unde, &c.* And notwithstanding *Wells* sued a *Cap' ad Satisfac'* of the whole 400 Marks, and Exigent upon it, and *Dennis* was Outlawed. The Court reversed the Outlawry and Execution, for it ought to have made mention of the 90 *l.* levied. *Cre. El. 334.*

Execution reversed, because it makes not mention of the part that was levied.

Wiseman

The Law of Executions.

Wiseman had Judgment in Debt in *B. C.* against *William Fish*, and then after the Year, without any *Scire facias*, takes out a *Capias* against him and Arrests him, and upon this he brought a Writ of Error in *B. R.* and the Judgment was affirmed, but the Execution reversed, because it was not warrantable, the Process being erroneous, because he ought to have a *Scire facias*. And the diversity is where one is lawfully taken in Execution, and after discharged by Writ of Error, and the Judgment affirmed, a new *Capias* lies not against him, but against his Sureties. Execution shall be Awarded if he agree not to render himself in discharge of his Sureties; and if he will not do it, he who recovered hath no other Remedy but against his Sureties to pay the Condemnation by reason of their Recognizance; but where one is not lawfully taken in Execution, as upon erroneous Process, the Execution is reversed. And if he be delivered, he may be taken in Execution again; for the first Execution was erroneous, and is no Record, being reversed. *Godb.* 371. *Pak.* 447. *1 Roll* 402. *Pl.* 12.

One law-
fully taken
in Execu-
tion, and
after dis-
charged by
Writ of
Error, no
Capias lies a-
gainst him,
but against
his Sure-
ties.

Execution superseded by Writ of Error.

Execution after notice of Error. If Execution be done after notice of Error brought, or the Roll mark'd, all may be undone, especially on *Capias ad Satisfaciend'*, if the Roll be marked before Execution

cution sued forth, otherwise not. *Luston and Johnson's Case*, *Trin. 14 Car. 2. B. R.*

Note, for a Rule : If a Writ of Error be not signed by the Chief Justice, the Party on Motion may take out Execution, unless a new Writ be taken out on Notice within a Week or a short time ; but if it be signed, though not returned, the Court will give Rules to certify the Record on a second Writ of Error delivered, which in this Case is a *Superfedeas*. *1 Keb. 902. Ship-ton's Case.*

Writ of Error signed by the Chief Justice.

After Execution made out, the Defendant's Attorney sheweth a Writ of Error to the Plaintiff's Attorney, after which Execution is done ; and, *per Cur'*, it is well done. The Writ of Error not being allowed by the Chief Justice within four days after the making, and the Court would not undo the Execution. *2 Keb. 294. Brittain and Hawkinson.* And *1 Mod. 112. 1 Vent. 255.* it's Ruled, a Writ of Error shall not supersede Execution, unless shewed to the Party, and he must not foreclose his time of having it allowed ; for if it be not allowed by the Court within four days it's no *Superfedeas*. It must be shewed to the Clerk on the other side, and allowed by the Court. But if Execution be executed before shewing, or allowance of Error, it is unavoidable. For

Writ of Error allowed.

On *Fieri facias* sued out, and then returned that the Goods remain *pro defectu emptorum*, by Error or *Superfedeas* sued out, after that the Vendition is not hindred ;
but

but if the Error were allowed before, then *Supersedeas* tho' the Sheriff be unpunishable, yet *Supersedeas* *quia improvide*, notwithstanding Execution done, shall go *quia improvide*, 1 *Keb.* 324.

And if Error be brought and shewed to the Attorney, if Execution proceed a *Supersedeas* *quia Erronice* shall go.

The *Fieri fac'* is the Execution, and the *Venditioni* but Process upon it. *Aliter*, if the Sheriff or Attorney had no notice of the Error.

Allowance of the Writ of Error, when. Note, The Writ of Error ought to be allowed within four days after the Suing of it out, and within four days after that the Bail ought to be put in, or else the Plaintiff may take out Execution.

Maynard in *B. C.* prayed a *Supersedeas* after Execution executed by Seisure, and before the Sale of the Goods, upon 2 *Roll* 49. and 1 *Roll* 894. there being a Writ of Error duly taken out before, but the Clerk of the Errors not being then in Town, it was not allowed. Before allowance the Court can take no notice of a Writ of Error, 3 *Keb.* 169. *Mule and Warren*. In this Case it appeared after by the Return of the Sheriff of the *Scire facias*, that a *Supersedeas* came before Execution, but in truth it came after the Goods was Seised and before the Sale, but after the Sheriff had taken Security for the Money and discharged the Execution. *Pet Cur'*, a *Supersedeas* after Goods seised is a *Supersedeas* as to Sale, but the Sheriff having received the Money or taken Security, this is not discharged by

by *Superfedeas*, but the Sheriff must return the Money into Court. 1 *Keb.* 174.

In *Cotton* and *Daintry's* Case Judgment was given *pro Quer'*, now on Examination by the Secondary it appeared that Execution was taken out half an hour before any Writ of Error sealed, and served half an hour after, but no notice to the Officer, yet, *per Cur'*, it was set aside ; but no Contempt, 2 *Keb.* 506, 508. And the Money taken ordered to be brought into Court.

The Sheriff made a Warrant to the Bailiff to take the Body in Execution by *Ca' Sa'*, and before the Warrant executed, the Sheriff receives a *Superfedeas*, the Bailiff The Bailiff Arrests having no notice of the *Superfedeas* having no notice proceeds : the Arrest is not lawful, but the Bailiff is excusable in Trespass. *Moor* 671.

A *Superfedeas* was prayed in the Dean of St. Paul's and Capel's Case. For suing out Execution notwithstanding special Bail put in (as ought to be) before the Lord Chief Justice in Writ of Error, which although it be but *de bene esse*, yet it's good if no exception be made against them ; and *per Cur'*, till over-ruled no Execution ought to be taken. The notice of Bail put in is only to excuse the Party of Contempt, but not necessary if the Bail be put in, the Court awarded *Superfedeas*. 1 *Keb.* 690. After Bail in a Writ of Error no Execution to be taken out.

Stat. 13 Car. 2. c. 2. Recognizance in Writs of Error.

No Execution shall be stay'd in any of the Courts mentioned in 3 Jac. 1. c. 8. (*viz.*) in the Courts at *Westminster*, Counties Palatine of *Lancaster*, *Chester* or *Durham*, or of the great Sessions in *Wales* by Writ of Error or *Superfedeas* thereon, after Verdict and Judgment thereupon, in any Action on Statute 2 Ed. 6. for not setting out of Tythes, Action on the Case, upon promise for payment of Money, Action sur Trover, Covenant, Detinue and Trespass, unless such Recognizance as by the said Act is directed (*viz.*) in double the Sum to prosecute the Writ of Error with effect.

Statute 16 & 17 Car. 2. c. 8.

No Execution shall be staid in the King's Courts at *Westminster*, Courts of Record in Counties Palatine of *Lancaster*, *Chester*, or *Durham*, or in the great Sessions in any the twelve Shires of *Wales*, by Writ of Error after Verdict and Judgment thereupon in any personal Action; unless a Recognizance, according to the Statute of 3 Jac. 1. c. 8. be first acknowledged (*viz.*) to prosecute with effect. Neither shall Execution be staid by Error upon any Judgment after Verdict in Dower or *Ejectione firme*, unless the Plaintiff in such Writ of Error become bound to the Defendant in such Sum

Sum as the Court shall think fit, that if the Judgment be affirmed, or the Writ discontinued in his default, or be nonsuit, he will pay such Damages and Sums of Money, to ascertain which a Writ of Inquiry shall issue, to inquire of the mean Profits and Damages (done after the first Judgment) as shall be awarded, and Costs of Suit.

Now, in *Luston and Johnson's Case*, *Trin.*

14 Car. 2. B. R. Error without Bail is a *Supersedeas* in Ejectment, notwithstanding the new Act of 13 Car. 2. c. 2. being not within the general words Trespass. Tho' Execution be sued forth, if Error be brought before it be executed, it is a *Supersedeas*. Error without our Bail a *Supersedeas* in Ejectment.

In *Audita Quer'*, if there be any ground for it on Record or in Writing, the Plaintiff shall have a *Supersedeas* for staying of Execution against him; but otherwise if it be but matter of Fact; as if the matter for which the Execution was sued was Usurious, or upon Escape. 10 Jac. B. *Moston and Parry*.

Upon *Audita Quer'*, before Execution had, a *Supersedeas* may be granted, as well of the Land and Goods, as of the Body. *Aud' Quer'.*

Mich. 5 Jac. Winder and Coyner's Case. Alit' if one on a Statute Merchant be taken in Execution, and his Land extended, and *Liberate* awarded, a *Supersedeas* shall not be granted for Lands and Goods, because they cannot grant a *Supersedeas* after Execution served and executed. *Idem Case*. No *Supersedeas* after Execution executed.

Restitution by reason of Reversal upon Error.

Plaintiff brings Ejectment, and hath a Verdict at the Assizes. The Defendant brought a Writ of Error, and had it allowed, and Bail was put in the 24th of Octob. The Plaintiff the 27th of October after not having notice of the Writ of Error enters Judgment generally, which refers to the first day of the Term, and took Execution the first day of the Term, and had it executed before notice of the Writ of Error. And now it was moved to have Restitution ; for by the suing the Writ of Error, and allowance, and Bail put in, the hands of the Court are foreclosed, so that they cannot grant Execution, and so the Execution void. And though the Party ought not to be punish'd for suing Execution after the Writ of Error allowed, he not having notice of it, and so is not in Contempt, yet Restitution ought to be made to the Defendant. And though the Judgment by the general entry refers to the first day of the Term, *scilicet*, 23 Oct. and Execution is of the same Date, which is before the allowance of the Writ of Error, which is not till the 24th of October, yet the Judgment being upon a Verdict given in the Vacation, upon which Judgment may not be entred by the Rules of the Court until the *quarto die post*, *scil.* 27 Oct. and then was

Restitution awarded for entering Judgment irregularly.

Judgment on Verdict not to be entred till *quarto die post*.

Judg-

Judgment signed: The Court awarded Re-
stitution without Costs of either. 3 *Levins*
310. *Smith and Cave*.

It was moved in *Loveless* and *Harris's*
Case. *Mich. 19 Car. 2. B. R.* that Money
taken in Execution might be restored, and
the Execution Superfeded, being taken out
pendant a Writ of Error in the *Exchequer*
Chamber on Judgment in *B. C.* which was
granted *per Cur.* For albeit the Record is
still in *B. R.* yet virtually it's there till Cer-
tificate of the Transcript affirmed or re-
versed; and albeit Execution were execu-
ted after the Judgment, yet being *Teste* be-
fore in the same Term the Court Superse-
ded all.

Execution
taken out
pending a
Writ of
Error in
Cam' Scac.

When any Man recovers any Possession
or Seisin of Land in any Action by erroneous
Judgment, and afterwards the Judgment
is reversed, then upon that the Plaintiff in
the Writ of Error shall have a Writ of Re-
stitution, and that Writ recites the first Re-
covery, and the reversal of it in the Writ
of Error is, that the Plaintiff in the Writ
of Error shall be restored to his Possession
and Seisin, *una cum exitibus* thereof from
the time of the Judgment. And the Plain-
tiff in the Writ of Error shall have Exe-
cution against him who recovereth all the
mean Profits without any regard by whom
taken; for the Plaintiff in the Writ of Er-
ror cannot have any remedy against Stran-
gers, but only against him who is Party
to the Writ of Error, for the Writ is to

In recove-
ry of Land
by errone-
ous Judg-
ment.

Mean Pro-
fits.

command the Sheriff to enquire of the Issues and Profits generally between the Judgment and the reversal, with all which he who recovers shall be charged; and as the Law charged him with all the Mean Profits, so the Law gives him remedy against all Trespassors in the Interim, notwithstanding the reversal. 12 Rep. in *Vivian* and *Melwell's Case*.

But in *Simpson and Jackson's Case*. Error of a Judgment in *Durham* for the Plaintiff, the Judgment being reversed in B. R. a Writ of Restitution was awarded, and to enquire what were the Profits of the Land recovered *tempore judicii*, which was the 7 Aug. 19 Jac. Whereupon the Inquisition returned that they amounted to 10 l. the Writ was ruled to be ill; for it ought not to have been what the Profits of the Land amounted to from the Judgment, for the Plaintiff is not to answer the Profits longer than from the time of the Execution sued which was long after. And the Plaintiff in the Writ of Error had a new Writ of Restitution, which was to enquire what Profits of the Land the Plaintiff who recovered had taken *colore judicii predicti* which was 7 Aug. 19 Jac. and after the reversal thereof, and the Writ was filed, and the Plaintiff had Execution of the Damages found by that Writ. Cro. Jac. 698.

✓ The Court in *Wingfield and Valence's Case* was moved to have Restitution of Money out of the Hands of a Sheriff, which he had

had levied upon Execution, because it issued forth erroneously; for before the Execution taken forth, the Defendant brought a Writ of Error in *Cam' Scacc'*, and the Record was removed thither; and although the late Act saith, That a Writ of Error shall be no *Supersedeas* to stay Execution, yet the Record being removed into the Exchequer, it is not now before us, nor was at the time of the Execution issued forth. And this being after a Verdict and Judgment, the Error is no *Supersedeas*, so it is mischievous both ways: Therefore the Court awarded a *Supersedeas quia errone.* to Superseede the Execution, and awarded the taking of the Money out of the Sheriffs Hands. *Hill. 1650. B. R. Stiles 414, 415.*

Supersedeas quia errone.
Money taken out of the Sheriffs hands.

By vacating of the Judgment.

Judgment was had in *Scire facias* against the Bail, and Execution of the Money levied; and after the Judgment was vacated, being unduly obtained, there being no *Capias* against the Principal filed, and Restitution awarded, and after the Defendant brought Trespass against the Plaintiff in the first Action for taking the Goods. *Per Cur'*, it well lies against the Party for the vacating of the Judgment, and is as if it never had been, and not like a Judgment reversed by Error. But if an Action be brought against the Sheriff he may plead the Writ

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only, but the Party ought to plead not only the Writ but the Judgment. *Twisden* said, he was not satisfied with the Judgment in this Case, which was in the time of *Glyn* Chief Justice, nor yet is, to make a Man a Trespassor by relation; for when the Execution was served, there was a Judgment, tho' vacated afterwards: 1 *Lev.* 95. *Turner and Felgate.* 1 *Sid.* Mesme Case, *Felgate and Mole.* 1 *Keb.* 488.

Restitution in Fieri facias and Utlawry.

Where to
be restored
to the Mo-
ney, and
not to the
Term.

If a Man recover Damages, and hath Execution by *Fieri facias*, and upon the *Fieri facias* the Sheriff sells the Term for Years to a Stranger, afterwards the Judgment is reversed, he shall only be restored to the Money for which the Term was sold, and not to the Term it self, because the Sheriff had sold it by command of the Writ of *Fieri fac.* 8 *Rep.* 143. Dr. *Drurie's Case*, 17. b. *Manning's Case*, *Godb.* 27. *Luddington and Anner.*

But if a Man recover Damages in Covenant (as the Case was) against *B.* and had an *Elegit* of his Chattels and of the Moiey of Lands, and the Sheriff upon this Writ delivers a Lease for Years of Land which *B.* had to the value of 50 *l.* to him who recovered *per rationabile pretium & extentum* (as the words were) to have as his own Term in full Satisfaction of 50 *l.*

part

part of the Sum recovered; and after *B.* Where one reverseth the said Judgment, *B.* shall be restored to the Term it self, and not to the value; for although the Sheriff might have sold the Term upon this Writ, yet here is not any Sale to a Stranger, but a delivery of a Term to the Party who recovers by way of Extent without any Sale, and therefore the Owner shall be restored, and the Sheriff is not bound by this Writ to sell the Term, as he is on a *Scire fac'*. *Pasch. 16 Jac. B. R. Buckhurst and May, per tot' Cur', sed Qu.* for it seems to be a Sale, all the Term being delivered to the Party (according to the value in gross, and not annual) so it is if personal Goods were delivered to the Party *per rationabile pretium & extentum*; upon a reversal of the Judgment he shall be restored to the Goods themselves for the same reason.

But now; If the Goods of one Outlaw'd are sold by the Sheriff upon a Writ of *Cap. Utlag. &c.* and after the Outlawry is reversed by Writ of Error, the Defendant shall have Restitution of his Goods: But if the Sheriff by force of a *Fieri facias* sell Goods, and after the Judgment is reversed by Writ of Error, the Defendant shall not have Restitution of the Goods, but the value of them, but in the Case of *Cap' Utlagat'* the Sheriff is not compellable to make and levy the Debt of the Goods, &c. of the Defendant, but may keep them to the use of the King. *5 Rep. 90. Hoe's Case.*

How it is upon a reversal of Outlawry. ✓

The Law of Executions.

✓ The Sheriff delivers a Term upon Execution grounded upon a *Testatum* where none was filed, which is void, the Party shall be restored to his Term again. And although it was valued by the Jury but at 100 *l.* and delivered to the Plaintiff to hold *ut bona & catalla sua*, yet the Defendant shall have it again; for he being the Party himself, this is but in Law a bare delivery in *Specie*, which ought to be restored in *Specie* again, and does not alter the Property absolutely, but attends the Execution to be good or ill, as it is. But if the Sale had been to a Stranger by the Sheriff for 100 *l.* though the value was 1000 *l.* yet upon reversal he shall never have the Term again, but the Money (*viz.*) the 100 *l.* For it is the folly of the Party that he did not pay the Judgment; and if such Sales should be avoided, none would buy Goods of the Sheriff. *Yek 180. Goodier and Junce.*

Sale by the Sheriff, where Re-stitution shall be in *Specie*, and where the Value.

✓ L. brought Debt against Sir W. Reade for 500 *l.* as Executor in London, *de bonis Testatoris*, and 5 *l.* Damages *de bonis Propriis*, &c. upon a *Fieri facias* into London, the Sheriff returns that he had wasted the Goods, and that he had no Goods of his own. Whereupon L. took out a *Fieri facias* against him into Durham, *de bonis propriis*, and the Writ was *Quod Testatum est*, that he had Goods there; but indeed there was no *Testatum* upon the Roll, nor Warrant for the Writ, whereupon a *Supersedeas* was awarded.

For want of a *Testatum* upon the Roll.

ed, and an Execution made upon that Writ by Sale of a Lease discharged. *Hob. 68. Leiceſter* againſt Sir *W. Reade*.

Sanders, in *Hart* and *Malcher's* Caſe, prayed Reſtitution upon an Execution made out after the Death of the Defendant in the Writ of Error, ſuppoſing the Writ thereby abated, as it does by the Death of the Plaintiff in the Writ of Error, as was agreed by all. But *per Cur'*, not by the Death of the Defendant, but there muſt be a *Scire facias* againſt the Executors. 2 *Keb. 571*.

Pleading to Scire facias for Reſtitution.

The Wife, *dum ſola*, recovered in *B.R.* in Action on the Caſe 26 *l. 13 d. 4 d.* and had Execution of it, and is yet poſſeſſ'd. The ſaid Judgment was reverſed in the *Exchequer* Chamber, and Reſtitution awarded, and afterwards ſhe took *H.* to Husband. The Plaintiff brought a *Scire facias* to have Reſtitution. Defendant pleads, that after the reverſal had, and before the Purchase of this Writ, he paid to the Plaintiff the ſaid Debt and Coſts, *abſq; hoc*, that they *poſſeſſionat' ſunt* of the ſaid Money, *prout*. *Per Cur'*, the Plea and Traverſe are both ill. The Pleading of Payment is ill, be-
pleading of Payment ill.
 cauſe it is grounded and affirmed againſt a Record, and Payment being againſt matter of Record cannot be a diſcharge,
unless

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Traverse
idle.

unless by matter of Record. In a *Scire fac'* to have Execution, payment is no Plea in discharge thereof, no more is it in a *Scire facias* to have Restitution. By *Berkley*, payment had been a good Plea if he had relied thereon, because he avers that thereby the Party is satisfied. And in divers Cases, matter of Fact may be pleaded in discharge; as in Debt upon an Escape he may plead, that the Plaintiff commanded him to let him out of Execution, and such like; but by all the Court the Traverse is immaterial and idle; and by his Traverse he waves his Pleading of the Payment, which being especially shewn for cause of Demurrer, is good, and Judgment against the Defendant. *Cro. Car. 328. Vesey* against *Harris & Ux'*.

Scire facias to have Execution of Lands extended. Vide 2 Sand. 72.

Surmise of
Payment.

Audita Quer' was brought to avoid Execution of a Judgment, and surmised, that after the Judgment he had paid the entire Sum. By *Popbam* such a Surmise shall not avoid a Judgment upon a bare payment without Writing, or other matter of Evidence, no more than it is any Plea to bar an Execution by *Fi' fac'* or *Sci' fac'*. But by the other Judges it was held a good Surmise; for this is not only a Suit in Law but in Equity. It is as a Commission to examine the Cause,
for

for it is not any reason if the Money be satisfied he should lie in Execution. *Cro. Jac. 29. Oguel and Randoll.*

Sheriff's Fees for Execution.

The Sheriffs of *London* brought Debt of 35 *l.* for their Fees for executing a *Capias ad Satisfaciend*^r directed to them, and demanded by force of the Statute of 29 *Eliz. c. 4.* 12 *d.* in the Pound for the first 100 *l.* and 6 *d.* in the Pound for the residue. Demurrer, because there is not any Action given by the Statute. 2. Because they ought to have but 6 *d.* in the Pound, where the Sum exceed 50 *l.* and so was the Opinion of the Court. *Sed Qu. Cro. El. Garney and Soames, fo. 335.*

It was adjudged in *Lister and Bromley's Case, Cro. Car. 286, 287.* the Sheriff shall have 12 *d.* in the Pound for every Pound of the first 100 *l.* and 6 *d.* for every Pound over the 100 *l.* And though it be provided in the Statutes, that this shall not extend to Cities or Corporations, yet that is only to be intended for the executing Judgments in the said Corporations, and not to their executing Judgments out of Superior Courts.

Information on the Statute of 29 *Eliz.* for taking above 12 *d.* in the Pound for executing Process upon Judgment in *B. C.* The Defendant pleaded the Proviso in the Statute,

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Statute, wherein all Cities and Corporations and their Officers are excepted. Demurrer. *Per Cur'*, the Statute shall be expounded as well for serving Executions upon Judgment in other Courts as in their own Courts. *Cro. El.* 265. The Sheriff of Gloucester's Case.

Debt for 12 *l.* by the Sheriffs of London for their Fees upon the Statute of 28 *Eliz.* c. 4. for doing Execution. The Statute is, they shall not receive *ultra* such a Sum. *Per Cur'*, that implies that they may take so much as is not prohibited, and although the Statute doth not give an Action for it, yet because it is a Duty, an Action is given them by Law. *Moor.* The Sheriffs of London and Michell's Case.

Judgment and Execution in Inferior Courts pleaded.

Trespass of breaking his House, and taking a Cup till the Plaintiff paid 22 *s.* Defendant justifies by Pleint and Judgment in *Wakefield*, and Precept of Execution. Plaintiff Demurrs.

1. He said *quædam Curia*, and saith not what it is.
2. *Taliter processum est* till Judgment, which is ill in Inferior Court.
3. The Defendant *ut Ballivum Seneschalli* took, is ill.

4. The

4. The Execution is at such a Place in the same Parish *predict'*, but saith not *infra Jurisdictionem*, for though a Village and Parish may be of Co-extent, yet not a Mannour and Parish, as 29 Car. 1. *Sherington Talbot's Case*. *Per Cur'*, all the Exceptions are material. *Micb. 23 Car. 2. B. R. Gamble and Forrest.*

Plea to an Action of False Imprisonment was, that St. Edmondsbury is an ancient Borough, and that the Defendant, *infra Jurisdictionem Curie de Record* of the said Borough, was indebted to the Defendant, and for the Recovery of it the Defendant *implacitasset in eadem Curia & invenit pleg' ad prosequend' Sectam suam & superindetaliter processum fuit in eadem Curia*, that he had Judgment and Execution which he delivered to the Defendant, being a Bayliff, who at D. *infra Jurisdictionem Curie molliter, &c. Per Cur'*, this short way of Pleading a Judgment in the Inferior Court by *implacitasset & talit' process' fuit*, that he recovered, is good, although anciently it was otherwise used. But they ought to begin the Plea without levying the Plainr, as in *Adams and Vernon's Case. Levins.* They must plead a Complaint levied, without which they cannot hold Plea; for Proceeding without Complaint, is void. But in this Case, by *Hale Chief Justice*, the *implacitasset* and Pledges found are Tantalment. 3 *Levins* 404. *Patrick and Johnson.*
Judgment

Plea to an Action of Faux Imprisonment

The Pleading a Judgment in an Inferiour Court.

They must Plead a Complaint levied.

The Law of Executions.

Judgment in Inferior Court is pleadable in Bar in a Superior Court ; and it is also pleadable in Abatement, if it be for the same thing. 2 *Levins* 93. *Atkinson* and *Woodburn*.

C A P.

*An Assignment of Lands extended upon
a Recognizance by Bargain and Sale.*

THis Indenture made, &c. Between T. B. of, &c. of the one part, and C. D. of, &c. and O. F. of, &c. of the other part; Witneseth, Whereas R. R. by the name of, &c. in and by one Recognizance bearing date, &c. taken, acknowledged and sealed before Sir J. H. Kt. Lord Chief Justice of *England*, according to the Form of the Statute for recovery of Debts in that Case provided, standeth bound unto the said T. B. in the Sum of 500 *l.* payable, &c. as by the same Recognizance.

And whereas also the said T. B. hath extended, and to him is delivered in Execution the Mannour of *B.* with the Appurtenances in the County of *S.* at the yearly Rent of, &c. by reason of the non-payment of the said Sum of 500 *l.* Now the said T. B. for divers good Causes and Considerations him thereunto moving, hath Bargained, Sold, Assigned, and Set-over unto the said C. D. and O. F. all the said Manour of *B.* with the Appurtenances, and all the Estate, Right, Title, Claim and Demand whatsoever, which he the said T. B. hath by reason of the said Extent of, in, and to the said Mannour, and of, in and to every part and parcel thereof, and in and to all and singular the Messuages,
Lands

Lands and Tenements so extended, and delivered in Execution as aforesaid. And the said T. B. for himself, his, &c. doth Covenant and Grant to and with the said C. D. and O. F. their, &c. that he the said T. B. hath not done or suffered any act or thing, and that he the said T. B. his Executors or Administrators at any time or times hereafter shall not do any act or acts, thing or things, whereby the said Extent or Extents, or the Estate, Title or Interest of the said C. D. and O. F. or either of them, or of the Executors, Administrators or Assigns of them or either of them, by reason of the said Extent may in any wise be hurt, hindred or impeached, discharged or made void. And further, that he the said T. B. his Executors and Administrators shall and will at the reasonable Request, Costs and Charges in the Law of the said C. D. and O. F. or either of them, make, do, and suffer to be done, made or acknowledged all and every such lawful and reasonable act and acts, thing and things, device and devices in the Law whatsoever, for the further Assurance, Surety and Conveying of the Premises for and during all the time and term of the said Extent and Execution unto the said C. D. and O. F. as by their or either of their Counsel learned in the Law shall be reasonably devised or required. In witness, &c.

A Bar-

*A Bargain and Sale of a Term for Years,
taken in Execution by a Fieri facias.*

THis Indenture made, &c. Between
W. S. one of the Bailiffs of J. G. Esq;
Sheriff of the County of, &c. of the one
part, and D. C. of, &c. of the other part.
Whereas W. P. of, &c. at the time of making the Warrant herein after mentioned was possess'd of a Term for Years yet to come and unexpired, of and in all that Messuage, &c. in, &c. in his own Right, or in the Right of M. his Wife. And whereas N. C. of, &c. in the Court of *Common Pleas* at *Westminster* (in such a Term) did obtain against the said W. P. one Judgment for 40 *l.* Debt, and 30 *s.* Costs of Suit, upon which Judgment in the Term of *St. Michael* last past a Writ of *Fieri facias*, returnable in *Octab. St. Hillarii* issued out of the said Court, and was directed and delivered unto the said Sheriff in Form of Law, to be executed; which said Sheriff on the said Second Day of *December* last, made his Warrant unto the said W. S. and others jointly and severally, for the Execution of the said Writ. And the said W. S. by the said Writ and the said Warrant to him made as aforesaid, hath entred into and upon the said Messuage, &c. and seized and taken the same together with the Estate, Term and Interest of the said

Y

W. P.

The Law of Executions.

W. P. therein. Now this Indenture Witnesseth, That the said W. S. in pursuance of the said Writ and Warrant, and for and in Consideration of $\text{£} 1$. to him by the said D. C. before the Sealing and Delivery hereof well and truly in hand paid, Hath Bargained and Sold, and by these Presents doth fully, clearly and absolutely Bargain and Sell unto the said D. C. for and during all the remainder of such Term and Terms of Years, as the said W. P. in his own Right, or in the Right of his said Wife, had in the said Messuage, in as large and ample manner as the said W. P. and M. his Wife, or either of them, their or either of their Executors, Administrators or Assigns, may, might, should or ought to have, held or enjoyed the same.

Acquittance

*Acquittance and Release of an Extent by
an Administratrix.*

I A. B. of, &c. Administratrix of the Goods and Chattels of O. O. Gent. deceased, do acknowledge my self to have had and received of and from C. D. of, &c. the Sum of, &c. of lawful Money of *England*, being the Consideration Money which the said C. D. payeth to me, for the Vacating and Discharging of an Extent on a Statute Staple heretofore acknowledged and entred into by the said C. D. unto the said O. O. and also for the buying in and compounding of the said Extent by vertue or colour of the said Statute, and also for all my Interest and Demand in the same Statute and Extent, of which said Sum of, &c. I do hereby acknowledge the Receipt, and by these Presents do for me, my Executors and Administrators, remise, release, and for ever quit Claim unto the said C. D. the said Statute and Extent, and all manner of Process and Proceedings whatsoever, occasioned by reason thereof. In witness, &c.

Y a

T H E

Department of Health and Welfare of the District of Columbia

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T H E

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Ex. G. A. A.

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